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986
No. 2708

**UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

HENRY RODEN,

Plaintiff in Error.

vs.

WILLIAM DETTERING,

Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court for
the Western District of Washington,
Northern Division.

SHERMAN PRINTING & BINDING CO., SEATTLE, WASH.

Filed

DEC 16 1915

F. D. Monckton,
Clerk,

No. _____

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Superior Court of the State of Washington in
and for the County of King.

WILLIAM DETTERING, Plaintiff,

vs.

HENRY RODEN, Defendant.

No.

AFFIDAVIT OF SERVICE.

State of Washington, County of King—ss.

A. WINDT, being first duly sworn, on oath deposes and says: That at all times hereinafter mentioned he was and now is a citizen of the United States, above the age of twenty-one years, competent to be a witness in the above entitled action and in no wise interested therein.

That on the 10th day of March, 1914, he received the hereunto attached original summons and complaint in the above entitled action, and on the 10th day of March, 1914, he served the same upon Henry Roden, the defendant in said action, by delivering to and leaving personally with Henry Roden, in King County, State of Washington, a true and correct copy of said summons, together with a copy of the complaint in said action.

A. WINDT.

Subscribed and sworn to before me this 10th day of March, A. D. 1914.

B. A. NORTHRUP,

Notary Public in and for the State
of Washington, residing at Seattle.

Filed in Clerk's Office, Mar. 31, 1914.

W. K. SICKELS, Clerk.

By G. A. GRANT, Deputy.

In the Superior Court of the State of Washington in
and for the County of King.

WILLIAM DETTERING, Plaintiff,

vs.

HENRY RODEN, Defendant.

No.

COMPLAINT.

The plaintiff complains of the defendant and alleges and says:

I.

That the defendant now is and at all times hereinafter named was an attorney at law duly authorized and licensed to practice law in the District of Alaska.

II.

That on or about the 1st day of February, A. D. 1910, the plaintiff employed the defendant to represent the plaintiff as an attorney at law in certain litigation then pending in the District of Alaska, and made, executed and delivered to the defendant a certain power of attorney to be used by the said defendant in the progress and settlement of such litigation for which the defendant was so employed by the plaintiff as his attorney.

III.

That on the 1st day of February, A. D. 1910, the plaintiff was the owner of Seventeen thousand five hundreds dollars (\$17,500.00) in gold dust then on deposit in the Washington-Alaska Bank at Fairbanks, in Alaska, and which said gold dust was then on deposit for the purpose of securing a certain promissory note made by the plaintiff and one Henry Asheim, and made payable to J. De Journal, for the sum of Nine thousand dollars (\$9,000.00).

IV.

That while the said defendant was so employed by the plaintiff to represent the plaintiff in said litigation and to represent the interests of plaintiff in

certain litigation pertaining to the interests of the plaintiff in certain mining claims, the defendant by virtue and authority of said power of attorney so made by the plaintiff to the defendant to aid the said defendant in representing plaintiff and his interests in said mining claims, wrongfully and without authority withdrew, signed away and delivered over to other persons, and wrongfully consented and permitted to be delivered over to other persons, adverse to the plaintiff, the said seventeen thousand five hundred dollars in gold dust, without any authority or right whatsoever so to do, and thereafter wrongfully and fraudulently failed, neglected and refused to pay over to, or to account to, the plaintiff for said gold dust or any part or portion thereof, and wrongfully and fraudulently denied having signed away the rights of the plaintiff in and to said gold dust, and denied having wrongfully converted or disposed of the same.

V.

That the plaintiff never knew of the facts relative to the wrongful disposition and wrongful and fraudulent disposal of said gold dust until on or about the 20th day of December, A. D. 1913, at which said time it was impossible for the plaintiff to obtain possession of said gold dust or to recover the value of the same or any part or portion thereof, and that the failure of the plaintiff to learn the facts relative to the wrongful and fraudulent disposal and diversion of said gold dust was due wholly to the wrongful, fraudulent acts and declarations of the defendant in wrongfully concealing the true facts relative to the same from the plaintiff.

VI.

That the plaintiff has been injured and damaged by the wrongful, unauthorized and fraudulent acts of the defendant as herein set forth in the full sum of Seventeen thousand five hundred dollars (\$17,500.00).

AND FOR A SECOND CAUSE OF ACTION PLAINTIFF ALLEGES AND SAYS:

I.

Plaintiff hereby refers to and repeats each and all of the allegations contained in the first cause of action set forth herein, and makes said allegations and each of them parts of this his second cause of action.

II.

That while the said defendant was so acting for the plaintiff as his attorney at law, and while the plaintiff was entitled to all facts in the possession of the defendant, and to fair dealing in all respects from the defendant, the defendant wrongfully, unlawfully and fraudulently misrepresented the facts as to the disposition and diversion of the said seventeen thousand five hundred dollars' worth of gold dust, and wrongfully and untruthfully informed the plaintiff that he had never consented to any disposition of said gold dust or signed away any right of the plaintiff in or to the same or any part thereof.

III.

That by said assertions of the defendant so made as set forth in the preceding paragraph the plaintiff was led to believe and did believe that he has a good defense in a certain suit brought by Ferdinand De Journal, as Plaintiff, against this plaintiff, as defendant, in the Superior Court of the State of Washington, in and for the County of King, to recover upon said promissory note for said sum of Nine thousand five hundred dollars.

IV.

That the plaintiff, believing he had a good defense to said promissory note, employed counsel and attorneys at great cost to defend the same, and went to a large expense for attorney's fees in defending said suit, when in truth and in fact this defendant had no defense to said suit as developed upon the trial of the same in the Superior Court of the State of Washington for King County, by reason and wholly due to the wrongful and fraudulent acts of the defendant in wrongfully and fraudulently disposing and divert-

ing said Seventeen thousand five hundred dollars in gold dust.

V.

That the plaintiff was required to pay and did pay the sum of Six hundred dollars for attorney's and counsel fees in said action hereinbefore named, and the costs of said suit, amounting to the sum of \$470 dollars over and above the amounts which the plaintiff would have been required to pay had the defendant truthfully stated the facts to the plaintiff relative to the wrongful diversion and disposition of said gold dust, and the plaintiff has been damaged thereby in the sum of One thousand seventy (\$1070) dollars.

WHEREFORE The plaintiff demands judgment as follows:

Judgment against the defendant in the sum of Seventeen thousand five hundred dollars (\$17,500.00) upon the plaintiff's first cause of action herein, and judgment against the defendant in the sum of One thousand seventy dollars upon the plaintiff's second cause of action herein, amounting in all to the sum of Eighteen thousand five hundred seventy dollars together with his costs and disbursements herein.

ARTHUR E. GRIFFIN,
Attorney for Plaintiff.

State of Washington, County of King—ss.

WILLIAM DETTERING being first duly sworn, on oath says: That he is the plaintiff in the above-entitled action; that he has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

WILLIAM DETTERING.

Subscribed and sworn to before me this 9th day of March, A. D. 1914.

ARTHUR E. GRIFFIN,
Notary Public in and for the State
of Washington, residing at Seattle.

Filed in Clerk's Office Mar. 31, 1914.

W. K. SICKELS, Clerk.

By G. A. GRANT, Deputy.

In the Superior Court of the State of Washington
for the County of King.

WILLIAM DETTERING, Plaintiff,

vs.

HENRY RODEN, Defendant.

No.

NOTICE.

TO WILLIAM DETTERING, Plaintiff in the above entitled action, and to ARTHUR E. GRIFFIN, his attorney:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE That the defendant Henry Roden, by his attorneys Farrell, Kane & Stratton, will present to the Honorable the Judges of the Superior Court of King County, in the department to which the above entitled case has been assigned, on the 30th day of March, 1914, at 1:30 o'clock P. M., or as soon thereafter as counsel can be heard, the accompanying Petition for Removal of the above entitled action to the District Court of the United States for the Western District of Washington, Northern Division, together with the Bond for Removal, a copy of which is hereto attached.

Dated this 30th day of March, A. D. 1914.

FARRELL, KANE & STRATTON,

Attorneys for Defendant

Filed in Clerk's Office, Mar. 30, 1914.

W. K. SICKELS, Clerk.

By G. A. GRANT, Deputy.

In the Superior Court of the State of Washington
for the County of King.

WILLIAM DETTERING, Plaintiff,

vs.

HENRY RODEN, Defendant.

No.

PETITION FOR REMOVAL TO THE DISTRICT
COURT OF THE UNITED STATES FOR THE
WESTERN DISTRICT OF WASHING-
TON, NORTHERN DIVISION.

To the Honorable, the Judges of the Superior Court
of the State of Washington, for King County:

The petition of Henry Roden, of Iditarod, Alaska,
respectfully shows:

That the above entitled cause is a suit at common
law, of a civil nature, wherein the matter in dispute
now exceeds and at the time of the commencement
of this suit, exceeded, the sum of Three thousand dol-
lars (\$3,000.00) exclusive of interest and costs, and
that this suit, and the entire controversy therein is
between the above named plaintiff William Dettering
on the one side, who at the time of the commencement
of this action was, ever since has been, and now is,
a citizen of the United States, a citizen of the State
of Washington, residing in the Western District of
Washington, and residing in King County, State of
Washington, and residing within the jurisdiction of
this Court; and your petitioner, Henry Roden, the
above named defendant, on the other side, is not now,
and was not at the time of the commencement of this
action, and never has been at any time whatsoever a
citizen or resident of the State of Washington, but is
now and at all times has been a citizen and resident of
Alaska.

Your petitioner desires to remove this suit from
the Superior Court of the State of Washington for
King County, into the United States District Court for

the Western District of Washington, Northern Division.

Your petitioner offers and files herewith a Bond, with good and sufficient surety for its entering into the District Court of the United States for the Western District of Washington, Northern Division, within thirty days, a certified copy of the record in this suit, and for paying all costs that may be awarded by said District Court if said Court should hold that this suit was wrongfully or improperly removed thereto.

Your petitioner further prays that said surety and bond may be accepted and that this suit may be removed to the next District Court of the United States in and for the Western District of Washington, Northern Division, pursuant to the Statutes of the United States, in such case made and provided, and that no further proceedings may be had therein in this Court.

This petition is supported by the Affidavit of the plaintiff hereto attached.

FARRELL, KANE & STRATTON,
Attorneys for Petitioner.

State of Washington, County of King—ss.

J. H. KANE, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the Petitioner in the above entitled action, and makes this verification for and on behalf of said petitioner for the reason that the said Henry Roden is not in the State of Washington; that he has read the foregoing petition, knows the contents thereof, and that the same is true.

J. H. KANE.

Subscribed and sworn to before me this 27th day of March, A. D. 1914.

STANEY J. PADDEN,
Notary Public in and for the State
of Washington, residing at Seattle.

State of Washington, County of King—ss.

HENRY RODEN, being first duly sworn, on his oath deposes and says: That he is the defendant named in the above entitled action; that he is now and for the past seventeen years has been a resident of the Territory of Alaska; that at the present time he is a resident and citizen of Alaska residing at Iditarod; that he is not now and has never been a resident of the State of Washington; that the Summons and Complaint in the above entitled action was served upon him as he was passing through the city of Seattle, on his way to his home in Alaska.

That he makes this Affidavit for the purpose of having said case transferred from the State Court to the Federal Court.

Dated this 10th day of March, 1914.

HENRY RODEN.

Subscribed and sworn to before me this 10th day of March, A. D. 1914.

LERROY V. NEWCOMB,
Notary Public in and for the State
of Washington, residing at Seattle.

Filed in Clerk's Office, Mar. 30, 1914.

W. K. SICKELS, Clerk.

By G. A. GRANT, Deputy.

In the Superior Court of the State of Washington
for King County.

WILLIAM DETTERING, Plaintiff,

vs.

HENRY RODEN, Defendant.

No.

BOND ON REMOVAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Henry Roden, as principal, and the Aetna Accident & Liability Co., as surety, stand held and firmly

bound unto William Dettering, the above named plaintiff, in the penal sum of Five hundred dollars (\$500.00) for the payment of which, well and truly to be made, to the said William Dettering, we do hereby bind ourselves, our successors, heirs, administrators and executors, jointly and severally firmly by these presents.

Sealed with our seals and dated at Seattle, Washington, this 30th day of March, A. D. 1914.

WHEREAS The above named Henry Roden is about to file its petition in the Superior Court of the State of Washington for King County for the removal of a certain cause therein pending, wherein William Dettering is plaintiff, and Henry Roden is defendant, to the District Court of the United States for the Western District of Washington, Northern Division;

Now, the condition of this obligation is such, that if said Henry Roden shall enter in the District Court of the United States for the Western District of Washington, Northern Division, within thirty days from the date of filing said petition, a certified copy of the record in this suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void otherwise it shall remain in full force and effect.

IN WITNESS WHEREOF The said Henry Roden and the said The Aetna Accident & Liability Co. have hereunto set their hands and seals this 30th day of March, A. D. 1914.

	HENRY RODEN,
	By FARRELL, KANE & STRATTON,
	By J. H. KANE, His Attorneys.
	THE AETNA ACCIDENT & LIABILITY CO.
(Corporate Seal)	By GEORGE H. ROURKE,
	Its Res. Vice-Pres.

Attest: CHAS. H. DIAL, Its Res. Asst. Sec.

Approved this 30th day of Mch., 1914.

A. W. FRATER,

Judge Superior Court.

Filed in Clerk's Office, Mar. 30, 1914.

W. K. SICKELS, Clerk.

By G. A. GRANT, Deputy.

In the Superior Court of the State of Washington
for King County.

WILLIAM DETTERING, Plaintiff,

vs.

HENRY RODEN, Defendant.

No.

ORDER OF REMOVAL.

Henry Roden, defendant in the above entitled case, having filed his petition to remove this cause to the District Court of the United States for the Western District of Washington, Northern Division, and having filed with said Petition his bond conditioned according to law, which bond has been approved by the Court, and said Petition and Bond having been filed within the time limited by law;

It is by the Court ordered, that the cause be and the same is hereby removed to the District Court of the United States for the Western District of Washington, Northern Division, and that all further proceedings in this Court be and the same are hereby stayed.

Done in open Court this 31st day of March, 1914.

A. W. FRATER, Judge.

Filed in Clerk's Office, Mar. 30, 1914.

W. K. SICKELS, Clerk.

By G. A. GRANT, Deputy.

State of Washington, County of King—ss.

I, W. K. SICKELS, County Clerk of King County, and ex-officio Clerk of the Superior Court of the State of Washington, in and for the County of King, do hereby certify that the foregoing is a full, true and correct transcript of the entire files and record in cause No. 100330, William Dettering vs. Henry Roden, as the same appear on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 18th day of April, A. D. 1914.

(Seal), W. K. SICKELS, County Clerk.
By G. A. GRANT, Deputy.

Indorsed: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 21, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

AMENDED COMPLAINT.

The plaintiff complains of the defendant and alleges and says:

I.

That the defendant now is and at all times hereinafter named was an attorney at law duly authorized and licensed to practice law in the District of Alaska.

II.

That on or about the first day of February, A. D. 1910, the plaintiff employed the defendant to represent the plaintiff as an attorney at law in certain litigation then pending in the District of Alaska herein Henry Avery, D. Cascaden, Jos. Janisus, Sam Asheim and Wm. Dettering were plaintiffs and E. T. Barnett, Cook, Ridenour, McGinn and Sullivan were defendants and made, executed and delivered to the defendant a certain power of attorney to be used by the said defendant to aid in the prosecution of such litigation for which the defendant was so employed by

the plaintiff as his attorney, and which said suit was brought to collect from the defendants the value of gold dust wrongfully and unlawfully mined by the defendants from ground owned by the plaintiffs.

III.

That on the 1st day of February, A. D. 1910, the plaintiff was the owner of Seventeen thousand five hundred (\$17,500) dollars in gold dust then on deposit in the Washington-Alaska Bank at Fairbanks, in Alaska, and which said gold dust was then on deposit for the purpose of securing a certain promissory note made by the plaintiff and one Sam Asheim and made payable to J. De Journal, for the sum of Nine thousand (\$9,000.00) dollars.

IV.

That while the said defendant was so employed by the plaintiff as his attorney to represent the plaintiff in said litigation pertaining to certain mining claims, the defendant on or about the 17th day of February, A. D. 1910, by virtue and authority of said power of attorney so made by the plaintiff to the defendant to aid the said defendant in prosecuting said suit for gold dust wrongfully mined from said mining claims, wilfully, fraudulently, wrongfully and without authority withdrew, signed away, disposed of and delivered over to other persons, and wrongfully, wilfully and fraudulently consented and permitted to be delivered over to other persons, adverse to the plaintiff, the said seventeen thousand five hundred dollars in gold dust, without any authority or right whatsoever so to do, and thereafter wrongfully and fraudulently failed, neglected and refused to pay over to, or to account to, the plaintiff for said gold dust or any part or portion thereof, and wrongfully, wilfully and fraudulently denied having signed away the rights of the plaintiff in and to said gold dust, and denied having wrongfully converted or disposed of the same.

V.

That the plaintiff never knew the defendant had

signed away the plaintiff's right to said gold dust or that defendant had diverted or consented to the diversion or disposition thereof until on or about the 20th day of December, A. D. 1913, at which said time it was impossible for the plaintiff to obtain possession of said gold dust or to recover the value of the same or any part or portion thereof, and that the failure of the plaintiff to learn the facts relative to the wrongful and fraudulent disposal and diversion of said gold dust was due wholly to the wrongful, fraudulent acts and declarations of the defendant in wrongfully concealing the true facts relative to the same from the plaintiff.

VI.

That the plaintiff has been injured and damaged by the wrongful, unauthorized and fraudulent acts of the defendant as herein set forth in the full sum of Seventeen thousand five hundred (\$17,500.00) dollars.

AND FOR A SECOND CAUSE OF ACTION PLAINTIFF ALLEGES AND SAYS:

I.

Plaintiff hereby refers to and repeats each and all of the allegations contained in the first cause of action set forth herein, and makes said allegations and each of them parts of this his second cause of action.

II.

That while the said defendant was so acting for the plaintiff as his attorney at law, and while the plaintiff was entitled to all facts in the possession of the defendant, and to fair dealing in all respects from the defendant; the defendant wrongfully, unlawfully and fraudulently informed and told the plaintiff "That he (the defendant) had not signed away any right of the plaintiff to said gold dust; that he had nothing whatever to do with taking, signing away or disposal of said gold dust; that he (defendant) did not know who had taken the gold; that if the gold dust had

been removed or taken from the bank it had been done without his (defendant's) knowledge or consent."

III.

That each and all of said statements were false and untrue and were known to the defendant to be false and untrue when made; that they and each of them were made by the defendant to deceive, mislead, wrong, cheat and defraud the plaintiff and that they did mislead, deceive, wrong and defraud the plaintiff; that the plaintiff believed said statements to be true and relied upon the same; that plaintiff was misled and deceived thereby and relying thereon was induced to and did believe that he had a good defense in and to a certain suit brought by Ferdinand De Journal, as plaintiff, against this plaintiff, as defendant, in the Superior Court of the State of Washington, in and for the County of King, to recover upon said promissory note for said sum of Nine thousand five hundred (\$9,500.00) dollars.

IV.

And relying on said statement and believing he had a good defense to said promissory note plaintiff employed counsel and attorneys at great cost to defend the same, and went to a large expense for attorney's fees in defending said suit, when in truth and in fact this defendant had no defense to said suit as developed upon the trial of the same in the Superior Court of the State of Washington for King County, by reason and wholly due to the wrongful and fraudulent acts of the defendant in wrongfully and fraudulently disposing and diverting said Seventeen thousand five hundred (\$17,500.00) dollars in gold dust.

V.

That the plaintiff was required to pay and did pay the sum of Six hundred (\$600.00) dollars for attorney's and counsel fees in said action hereinbefore named, and the costs of said suit, amounting to the sum of Four hundred and seventy (\$470.00) dollars over and above the amount which the plaintiff would

have been required to pay had the defendant truthfully stated the facts to the plaintiff relative to the wrongful diversion and disposition of said gold dust, and the plaintiff has been damaged thereby in the sum of One thousand and seventy (\$1070.00) dollars.

Wherefore the plaintiff demands judgment as follows:

Judgment against the defendant in the sum of Seventeen Thousand Five Hundred (\$17,500.00) dollars upon the plaintiff's first cause of action herein, and judgment against the defendant in the sum of One thousand and seventy (\$1,070.00) dollars, upon the plaintiff's second cause of action herein amounting in all to the sum of Eighteen thousand five hundred and seventy (\$18,570.00) dollars together with his costs and disbursements herein.

ARTHUR E. GRIFFIN,

Attorney for Plaintiff.

Indorsed: Amended Complaint. Filed in the U. S. District Court, Western Dist. of Washington, June 15, 1914. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy.

DEMURRER TO AMENDED COMPLAINT.

Comes now the above named defendant and demurs to the Amended Complaint of the plaintiff herein, and to the first and second causes of action set forth therein, upon the following ground, to-wit:

I.

That the plaintiff's alleged cause of action is barred by the lapse of time and by the statute of limitations, and that the plaintiff has been guilty of laches herein.

II.

That the same does not state facts sufficient to constitute a cause of action against the defendant.

FARRELL, KANE & STRATTON,

Attorneys for Defendant.

Indorsed: Demurrer to Amended Complaint. Filed in the U. S. District Court, Western Dist. of Washington, June 5, 1914. Frank L. Crosby, Clerk. By Deputy.

OPINION ON DEMURRER TO AMENDED COMPLAINT OVERRULED.

Arthur E. Griffin, for Plaintiff.

Farrell, Kane & Stratton, for Defendant.

NETERER, District Judge.

This is an action commenced by plaintiff against the defendant in which he alleges in substance that about the 1st day of February, 1910, he employed the defendant as his attorney in certain litigation then pending in the District of Alaska, wherein Henry Avery, D. Cascaden, Joseph Janisus, Sam Asheim and plaintiff were plaintiffs, and E. T. Barnett *et al.* were defendants, and delivered to the defendant his certain power of attorney to be used by the defendant to aid in the prosecution of such litigation, for which the defendant was employed. The action involved the value of gold dust, wrongfully mined by the defendants from ground owned by the plaintiffs, and further alleges that the plaintiff, at the time stated, was the owner of \$17,500 worth of gold dust then on deposit in the Washington-Alaska Bank, at Fairbanks, Alaska; that the gold dust was deposited with the bank as collateral security to a certain note, made by the plaintiff and one Sam Asheim, and payable to J. De Journal, in the sum of \$9,000.00, and further alleges that the defendant, on or about the 17th of February, 1910, and while acting as the attorney for the plaintiff, and by virtue of a power of attorney, willfully, fraudulently, wrongfully, and without authority, withdrew the gold dust and disposed of the same to other persons, and converted the proceeds to his own use. The plaintiff alleges:

“That the plaintiff never knew the defendant had signed away the plaintiff’s right to said gold dust, or that defendant had diverted, or consented to the diversion or disposition thereof until on or about the 20th day of December, A. D. 1913, at which said

time it was impossible for the plaintiff to obtain possession of said gold dust, or to recover the value of the same, or any part thereof, and that the failure of the plaintiff to learn the facts relative to the wrongful and fraudulent disposal and diversion of said gold dust was due wholly to the wrongful, fraudulent acts and declarations of the defendant in wrongfully concealing the true facts from the plaintiff."

The plaintiff further alleges, as a second cause of action, in addition to the allegations made in the first cause of action, which are made a part of the second cause of action, by reference thereto, that,

"While the plaintiff was entitled to all facts in the possession of the defendant, and to fair dealings in all respects from the defendant, the defendant, wrongfully, unlawfully and fraudulently informed and told the plaintiff 'that he (the defendant) had not signed away the right of the plaintiff to said gold dust, and that he had nothing whatever to do with taking, signing away, or disposing of said gold dust; that he (the defendant) did not know who had taken the gold; that if the gold dust had been removed or taken from the bank, it had been done without his (defendant's) knowledge or consent,' "

and then states that all of the statements were false and untrue and known to be such by the defendant, and were made for the purpose of misleading, deceiving, wronging and defrauding the plaintiff. That the plaintiff was mislead and deceived, and relying thereon, was induced to and did believe that he had a good defense in and to a certain suit brought by Ferdinand De Journal, as plaintiff, against this plaintiff as defendant, in the Superior Court of the State of Washington, in and for the County of King, to recover upon a promissory note in the first cause of action mentioned, and relying on said statements, and believing them to be true, he employed counsel and went to large expense, when in truth and in fact there was no defense by reason and wholly due to the wrongful and

fraudulent acts of the defendant in wrongfully and fraudulently disposing and diverting the said \$17,500 worth of gold dust. That plaintiff expended a total of \$1,070.00, and prays judgment for \$17,500.00, the value of the gold dust, and \$1,070.00, the amount of money expended in this litigation.

The defendant:

"Demurs to the amended complaint of the plaintiff herein and to the first and second causes of action set forth therein upon the following grounds, to-wit:

I.

That the plaintiff's alleged cause of action is barred by the lapse of time and by the statute of limitations, and that the plaintiff has been guilty of laches herein.

II.

That the same does not state facts sufficient to constitute a cause of action against the defendant."

It is manifest that the demurrer filed in this case is a general demurrer to the complaint as a whole, and is not a separate demurrer to the separate causes of action. If either of the counts of the complaint is good, then the demurrer must be overruled.

"A demurrer lies only when an entire pleading that is the entire cause of action is involved as part of a cause of action cannot be demurred to, for if any part of the bill demurred to is good, the demurrer to the whole cannot be sustained. If the complaint contains one good cause of action demurrer to the whole complaint will not lie."

(*Estey on Pleading & Practice*, page 420, par. 3068. Citing *Weed vs. U. S.*, 65 Fed. 399, at page 402; *Crosby vs. Lehigh Valley Road Co.*, 128 Fed. 193; *Miller & Lux vs. Rickey*, 123 Fed. 604.)

An examination of the pleading, I think, will disclose the fact that the demurrer to the first cause of action is good. This cause of action, upon its face shows that the action is barred, unless the pleader will

show upon the face of the pleading that the plaintiff had no knowledge of the facts upon which the cause of action is predicated until such a time as would bring it within the statute of limitations. The averments of count one to bring the pleader within this rule above set forth must be predicated upon this statement,

“The failure of the plaintiff to learn the facts alleged with reference to the wrongful and fraudulent disposal and diversion of said gold dust was due wholly to the wrongful, fraudulent acts and declarations of the defendants in wrongfully concealing the true facts relative to the same from the plaintiff.”

The most favorable statement of the rule for those seeking to avoid the bar of the statute is that in *Bailey vs. Glover*, 21 Wall. 342, 347:

“In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud.

We also think in suits of equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.”

The party seeking to avoid the bar of the statute, however, may not do so by general allegations of ignorance on his part, and the rule of pleading is thus laid down in *Wood vs. Carpenter*, 101 U. S. 135, 141:

“In this class of cases the plaintiff is held to stringent rules of pleading, and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentations was dis-

covered, and what the discovery is, so that the court may clearly see whether by ordinary diligence the discovery might not have been made." *Stearns v. Page*, 7 How. 819, 829. (Continuing)

"A general allegation of ignorance at one time and knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, and how it was made, and why it was not made sooner."

Hardt v. Heizweyer, 152 U. S. 547;
Godden v. Kimmell, 99 U. S. 201;
Lansdale v. Smith, 106 U. S. 391;
Hammond vs. Hopkins, 143 U. S. 224.

There is no difference in the rule of pleading in this regard in legal and equitable actions. It is apparent that the facts alleged in the first cause of action are not sufficient to avoid the statute.

The second cause of action, in paragraph II, states the facts set out in the second quotation in this opinion, and by reference makes the first quotation which is part of the first cause of action, a part of the second cause of action. I think that both statements taken together with other averments in the second cause of action, state sufficient facts to bring the pleader within the rule announced, and that the second cause of action is not vulnerable to the demurrer by reason of said fact.

The second cause of action sets forth the statements alleged to have been made by the defendant and which were alleged to be false and fraudulent, and were relied upon by the plaintiff, and because of the reliance upon the statements and because of their falsity, which was known to the defendant, the plaintiff was damaged in the sums set out in the complaint.

In *Bullis v. O'Beirne*, 195 U. S. 617, the Supreme Court of the United States said:

"Considerable argument was made by the learned counsel for the plaintiff in error as to the essential

allegations of the pleading where relief for fraud is sought. It is said that there is no averment in the complaint in this case of knowledge or intent to deceive on the part of the plaintiff in error, but it is averred that the representations were falsely and fraudulently made with intent to further the pecuniary interest of the plaintiff in error, and were known to be false when made. Such allegations have frequently been held to be the equivalent of averments of specific intent. Indeed it is difficult to see how a statement falsely and fraudulently made can be otherwise than intended to deceive. A statement fraudulently made with knowledge of its falsity must necessarily be intended to deceive."

"The facts pleaded show deceit predicated on existing facts which statements were false, and that plaintiff was misled thereby."

(*Kimber v. Young*, 157 Fed. 199.)

"Mere general allegations of fraud are of course not sufficient. They must be pointed by specific facts, which in and of themselves, tend to impart that complexion to the transaction or that at least are susceptible of that construction."

(*Van Horst v. Amer. Hop & Barley Co.*, 177 Fed. 976.)

"The leading English case concerning the doctrine underlying action for deceit is *Pasley v. Freeman*, 3 T. R. 51, decided in 1789. From this case, and the case of *Derry v. Peek*, L. R. 14 App. Cas. 337, decided by the House of Lords in 1889, the following rule is extracted and stated in *12 English Ruling Cases*, at page 235:

"When a person, with a view to influence the conduct of another, willfully leads him into a false belief, and this other person acts accordingly to his hurt, the act is said to have been induced by fraud, and the former is liable to the latter in damages in an action for deceit. To construe the fraud, it is not essential that the defendant was, or expected to be, benefited by

the deceit; but it is essential that he should have been guilty of willful falsehood (or at least reckless disregard of truth) in the representations made.'

This, by the decided weight of authority, sets forth the American doctrine on the same subject. To sustain an action for deceit there must be fraud in the defendant, intention to deceive the plaintiff, and damage to the plaintiff. A false statement made through carelessness and without reasonable ground for believing it to be true may be evidence of fraud, but does not necessarily amount to fraud." (Citing *Ming v. Woolfolk*, 116 U. S. 599, to same effect.)

(*Pittsburgh L. & T. Co. v. Nor. Cen. Life Ins. Co.*, 197 Fed. 471.)

"Two things must concur to entitle the plaintiff to recover: First, fraudulent or false representations in relation to the condition of the property; and second such representations must have constituted the basis of the sale on the part of the purchaser, by which he was in fact misled to his damage."

(*Stratton's Independence v. Dines*, 126 Fed. 978; affirmed in 135 Fed. 449.)

The second count states facts sufficient to constitute a cause of action. The demurrer, for the reasons stated, is overruled.

JEREMIAH NETERER, Judge.

Opinion on Demurrer to Amended Complaint.

Indorsed: Filed in the U. S. District Court, Western Dist. of Washington, June 30, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

SECOND AMENDED COMPLAINT.

The plaintiff complains of the defendant alleges and says:

I.

That the defendant now is and at all times hereinafter named was an attorney at law duly authorized and licensed to practice law in the District of Alaska.

II.

That on or about the 1st day of February, A. D. 1910, the plaintiff employed the defendant to represent the plaintiff as his attorney at law in certain litigation then pending in the District of Alaska wherein Henry Avery, D. Cascaden, Jos. Janisus, Sam Asheim and Wm. Dettering were plaintiffs, and E. T. Barnett, Cook and Ridenour and McGinn and Sullivan were defendants and made, executed and delivered to the defendant a certain power of attorney to be used by the said defendant to aid in the prosecution of such litigation for which the defendant was so employed by the plaintiff as his attorney, and which said suit was brought to collect from the defendants the value of certain gold dust wrongfully and unlawfully mined by the defendants and wrongfully appropriated to their own use from ground owned by the plaintiffs.

III.

That on the 1st day of February, A. D. 1910, the plaintiff was the owner of Seventeen thousand five hundred (\$17,500) Dollars in gold dust then on deposit in the Washington-Alaska Bank at Fairbanks, in Alaska, and which said gold dust was then on deposit for the purpose of securing a certain promissory note made by the plaintiff and one Sam Asheim and made payable to J. de Journal, for the sum of Nine thousand (\$9,000) dollars.

IV.

That while the defendant Roden was so employed by the plaintiff as his attorney to represent the plaintiff in said litigation pertaining to gold wrongfully mined and taken from certain mining claims, on or about the 17th day of February, A. D. 1910, by virtue and under authority of a power of attorney, which the plaintiff had executed to the defendant at

the defendant's request to aid the defendant in said litigation and for no other purpose, the defendant conspiring with the defendants in said suit to wrong, cheat and defraud the plaintiff, did wrongfully, unlawfully and without authority and without the knowledge or consent of the plaintiff, take, assign away and dispose of the said Seventeen thousand five hundred dollars worth of gold dust then and theretofore on deposit in the said Washington-Alaska Bank, and did wrongfully detain and fail to pay over to the plaintiff or to account to the plaintiff for said gold dust or any part or portion thereof or any part of the proceeds thereof, and has at all times since the said 17th day of February wrongfully and untruthfully stated to and informed the plaintiff that he the defendant did not take, assign away or dispose of said gold dust and that he the defendant had nothing whatever to do with the taking, assigning away or disposing of said gold dust and had no knowledge of what disposition was made of the same or any part or portion thereof; and defendant has at all times detained and wrongfully failed to pay to or account for the proceeds of said gold dust so taken and disposed of or any part thereof.

V.

That the plaintiff never knew the defendant had taken, assigned away or disposed of said Seventeen thousand five hundred dollars worth of gold dust or that defendant had detained the proceeds thereof until on or about the 20th day of December, A. D. 1913, at which said time it was impossible for the plaintiff to obtain possession of said gold dust, the proceeds thereof or any part or portion thereof; and that the failure of the plaintiff to learn the facts of the wrongful, fraudulent taking, disposal and conversion thereof and detaining of the proceeds thereof was wholly due to wrongful acts and declarations of the defendant in wrongfully and untruthfully informing the plaintiff that he the defendant had not taken, assigned away or disposed of said gold dust, and that he the defendant

had nothing whatever to do with the taking, assigning away or disposal of said gold dust; that said statements were made to deceive the plaintiff and they did deceive the plaintiff; that the defendant E. T. Barnett in said suit was the President and had full control of said Washington-Alaska Bank and said defendant and said Barnett conspired together to keep the plaintiff from ascertaining the facts of the taking, assigning away and disposal of said gold dust and detaining of the proceeds thereof; that immediately upon the return of plaintiff to Fairbanks, Alaska, after the taking and converting of said gold dust, plaintiff made many inquiries of the officers of said bank and others and could get no information whatever as to the taking, assigning away or disposal of said gold dust or detaining of the proceeds thereof, and nothing was recorded from which plaintiff could obtain any information as to the taking, assigning away or conversion of said gold dust or the proceeds thereof.

VI.

That the plaintiff and defendant were both residents of the District of Alaska at the time the defendant took and assigned away said gold dust and at the time the defendant converted the proceeds thereof to his own use, although at said time of said taking, assigning away and conversion the plaintiff was temporarily out of said district, and the defendant was in Alaska at all of said times and ever since; and that at all of said times the statutes of limitations in effect at all of the times herein set forth and now in said District of Alaska are as follows:

Section 835.

“Civil actions shall only be commenced within the periods prescribed in this title after the cause of action shall have accrued, except when, in special cases, a different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited shall only be taken by answer, except

as otherwise provided in section eighty hundred and ninety.”

Section 836.

“The periods prescribed in section eight hundred and thirty-five of this act for the commencement of actions shall be as follows:

Within ten years actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it shall appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within ten years before the commencement of the action: Provided, in all cases where a cause of action has already accrued, and the period prescribed in this section within which an action may be brought has expired or will expire within one year from the approval of this act, an action may be brought on such cause of action within one year from the date of the approval of the act.”

Section 837. Within ten years.

“First. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States.

Second. An action upon a sealed instrument.”

Section 838. Within six years.

“First. An action upon a contract or liability, express or implied, excepting those mentioned in section eight hundred and thirty-seven.

Second. An action upon a liability created by statute, other than a penalty or forfeiture;

Third. An action for waste or trespass upon real property;

Fourth. An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof.”

Section 839. Within three years.

“First. An action against a Marshal, Coroner, or Constable upon a liability incurred by the doing of an act in his official duty, including the nonpayment

of money collected upon an execution. But this section shall not apply to an action for an escape;

Second. An action upon a statute for penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the United States, except where the statute imposing it prescribed a different limitation."

Section 840. Within two years.

"First. An action for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not herein especially enumerated;

Second. An action upon a statute for a forfeiture or penalty to the United States."

Section 841. Within one year.

"An action against the marshal or other officer for the escape of a person arrested or imprisoned on civil process."

Section 842.

"An action upon the statute for the penalty given in whole or in part to the person who will prosecute for the same shall be commenced within one year after the commission of the offense; and if the action be not commenced within one year by a private party, it may be commenced within two years thereafter, in behalf of the United States, by the District Attorney."

Section 843.

"An action for any cause not hereinbefore provided for shall be commenced within ten years after the cause of action shall have accrued."

VII.

That the plaintiff has been injured and damaged by the wrongful, unauthorized and fraudulent acts of the defendant as herein set forth in the full sum of Seventeen thousand five hundred (\$17,500.00) dollars.

AND FOR A SECOND CAUSE OF ACTION PLAINTIFF ALLEGES AND SAYS:

1.

Plaintiff hereby refers to and repeats each and all of the allegations contained in the first cause of action set forth herein, and makes said allegations and each of them parts of this his second cause of action.

2.

That while the said defendant was so acting for the plaintiff as his attorney at law, and while the plaintiff was entitled to all facts in the possession of the defendant, and to fair dealing in all respects from the defendant; the defendant wrongfully, unlawfully and fraudulently informed and told the plaintiff "That he (the defendant) had not signed away any right of the plaintiff to said gold dust; that he had nothing whatever to do with taking, assigning away or disposal of said gold dust; that he (the defendant) did not know who had taken the gold; that if the gold dust had been removed or taken from the bank it had been done without his (defendant's) knowledge or consent."

3.

That each and all of said statements were false and untrue and were known to the defendant to be false and untrue when made; that they and each of them were made by the defendant to deceive, mislead, wrong, cheat and defraud the plaintiff and they did mislead, deceive, wrong and defraud the plaintiff; that the plaintiff believed said statements to be true and relied upon the same; that plaintiff was misled and deceived thereby and relying thereon was induced to and did believe that he had a good defense in and to a certain suit brought by Ferdinand De Journal, as plaintiff, against this plaintiff, as defendant, in the Superior Court of the State of Washington in and for the County of King, to recover upon said promissory note for said sum of Nine thousand five hundred (\$9500.00) Dollars.

4.

And relying on said statement and believing he had a good defense to said promissory note, plaintiff employed counsel and attorneys at great cost to defend the same, and went to a large expense for attorney's fees in defending said suit, when in truth and in fact this defendant had no defense to said suit as developed upon the trial of the same in the Superior Court of the State of Washington for King County, by reason and wholly due to the wrongful and fraudulent acts of the defendant in wrongfully and fraudulently disposing and diverting said Seventen thousand five hundred (\$7500.00) dollars in gold dust.

5.

That the plaintiff was required to pay and did pay the sum of Six hundred (\$600.00) dollars for attorney's and counsel fees in said action hereinbefore named, and the costs of said suit, amounting to the sum of Four hundred and seventy (\$470) Dollars over and above the amount which the plaintiff would have been required to pay had the defendant truthfully stated the facts to the plaintiff relative to the wrongful diversion and disposition of said gold dust, and the plaintiff has been damaged thereby in the sum of One thousand and seventy (\$1070) dollars.

WHEREFORE The plaintiff demands judgment as follows:

Judgment against the defendant in the sum of Seventen thousand five hundred (\$17500.00) dollars upon the plaintiff's first cause of action herein, and judgment against the defendant in the sum of One thousand and seventy (\$1070.00) dollars upon the plaintiff's second cause of action herein amounting in all to the sum of Eighteen thousand five hundred and seventy (\$18,570.00) dollars together with his costs and disbursements herein.

ARTHUR E. GRIFFIN,
Attorney for Plaintiff.

Indorsed: Second Amended Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 16, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

ANSWER TO SECOND AMENDED COMPLAINT

Comes now the above named defendant by his attorneys Farrell, Kane & Stratton, and for answer to the second amended complaint, denies and alleges:

I.

This defendant admits the allegations contained in paragraph I of said second amended complaint.

II.

Referring to paragraph II of said second amended complaint, this defendant admits that the plaintiff executed and delivered to him a certain power of attorney; and this defendant denies each and every other allegation in said paragraph II contained, and specifically denies that he was employed by the plaintiff or represented the plaintiff as his attorney at law.

III.

Referring to paragraph III of said second amended complaint this defendant denies the allegations therein contained.

IV.

Referring to paragraphs IV and V of said second amended complaint this defendant denies the allegations therein contained and each and every part thereof.

V.

Referring to paragraph VI of said second amended complaint this defendant admits that all the times mentioned in said complaint this defendant was a resident of the District of Alaska, and as to all other allegations in said paragraph VI contained this defendant says that he has neither knowledge or information sufficient to form a belief as to the truth or falsity thereof and therefore denies the same.

VI.

Referring to paragraph VII of said second amended complaint this defendant denies the allegations therein contained, and specifically denies that the plaintiff has been damaged in the sum of \$17,500 or in any other sum whatsoever.

ANSWER TO SECOND CAUSE OF ACTION.

I.

Referring to paragraphs I, II and III of the second cause of action set forth in plaintiff's second amended complaint, this defendant denies the allegations therein contained and each and every part thereof.

II.

Referring to paragraphs IV and V of the second cause of action set forth in plaintiff's second amended complaint this defendant says that he has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the allegations therein contained and therefore denies the same and each and every part thereof.

WHEREFORE, Defendant, having fully answered, prays that he may be discharged with his costs and disbursements incurred herein.

FARRELL, KANE & STRATTON,
Attorneys for Defendant,
1011 American Bank Bldg.,
Seattle, Wash.

Indorsed: Answer to Second Amended Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Aug. 18, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

AMENDED ANSWER TO SECOND AMENDED COMPLAINT.

Comes now the above named defendant, by his attorneys Farrell, Kane & Stratton, and for answer to

the second amended Complaint herein, denies and alleges:

I.

This defendant admits the allegations contained in paragraph I of said second amended Complaint.

II.

Referring to paragraph II of said second amended Complaint, this defendant admits that the plaintiff executed and delivered to him a certain power of attorney; and this defendant denies each and every other allegation in said paragraph II contained, and specifically denies that he was employed by the plaintiff or represented the plaintiff as his attorney at law.

III.

Referring to paragraph III of said second amended Complaint, this defendant denies the allegations therein contained.

IV.

Referring to paragraphs IV and V of said second amended Complaint this defendant denies the allegations therein contained and each and every part thereof.

V.

Referring to paragraph VI of said second amended Complaint, this defendant admits that at all the times mentioned in said Complaint this defendant was a resident of the District of Alaska; and this defendant admits that the Statutes relating to the limitation of action in effect at all of the times in said second amended Complaint mentioned in the District of Alaska are as set forth and pleaded in said paragraph VI of said second amended Complaint.

VI.

Referring to paragraph VII of said second amended Complaint, this defendant denies the allegations therein contained, and specifically denies that the plaintiff has been damaged in the sum of \$17,500.00 or in any other sum whatsoever.

FOR A FURTHER, SEPARATE, AND AFFIRMATIVE DEFENSE To the First cause of action set forth in the

second amended Complaint of the plaintiff herein, this defendant alleges:

I.

That at all of the times mentioned in the said second amended Complaint, this defendant was and still is a resident of the District of Alaska; and that during all of the said times there was and still is in full force and effect in the said District of Alaska certain laws relative to the limitations of actions, which laws are as follows:

Section 835.

"Civil actions shall only be commenced within the periods prescribed in this title after the cause of action shall have accrued, except when, in special cases, a different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited shall only be taken by answer, except as otherwise provided in section eight hundred ninety."

Section 840. Within two years.

"First. An action for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not herein specially enumerated;

Second. An action upon a statute for forfeiture or penalty to the United States."

II.

That the Plaintiff returned to Fairbanks, Alaska, only a few days after the 17th day of February, 1910, the date upon which the settlement of the litigation in which the defendant represented the plaintiff was settled; and that the said plaintiff knew of the said settlement, both by reason of the common talk in and about the town of Fairbanks, of the settlement of the celebrated litigation on Dome Creek; and also by the court records where the said litigation was pending and by the records of the recorder's office at Fairbanks, Alaska, and also having been fully advised by this defendant.

That the said plaintiff, by the exercise of ordinary

care could and should have known of all the facts relating to the said settlement, and the said \$17,500.00 of gold dust on deposit in the Washington-Alaska Bank was included in the said settlement; that the plaintiff, with full knowledge of all of the facts and circumstances of the said settlement and of the disposition of the said gold dust, delayed bringing any action to assert any claim against this defendant by reason of the said settlement or the facts set forth in his second amended Complaint herein, until more than three (3) years after the said settlement was made, and after the said plaintiff had full knowledge of all of the facts relative thereto; that by reason of the said delay the plaintiff's alleged claim or cause of action herein is barred by the statute of limitation in the said District of Alaska; and the plaintiff has been guilty of laches which would bar any recovery against this defendant.

ANSWER TO SECOND CAUSE OF ACTION.

I.

Referring to paragraphs I, II and III of the second cause of action set forth in plaintiff's second amended Complaint, this defendant denies the allegations therein contained and each and every part thereof.

II.

Referring to paragraphs IV and V of the second cause of action set forth in plaintiff's second amended complaint, this defendant says that he has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the allegations therein contained, and therefore denies the same and each and every part thereof.

WHEREFORE Defendant, having fully answered, prays that he may be discharged with his costs and disbursements incurred herein.

FARRELL, KANE & STRATTON,
Attorneys for Defendant.

Indorsed: Amended Answer to Second Amended Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 25, 1915. Frank L. Crosby, Clerk. By E. M. L. Deputy.

NOTICE TO PRODUCE.

To the above named defendant and to Farrell, Kane & Stratton, attorneys for the above named defendant:

You and each of you are hereby notified and will please take notice hereby that the plaintiff in the above entitled action demands an inspection of each of the following instruments in writing, now in the possession of the defendant, and demands that said instruments and each of them be produced for inspection before the trial of this cause and to be used in evidence at the trial, each of the following instruments:

First, That certain instrument in writing signed by Harry Havery, Sam Asheim, H. D. Cascaden, J. F. Hilcher, James Gianakas and William Dettering authorizing you to settle, for the sum of One hundred thousand (\$100,000.00) dollars, that certain suit then pending in the United States District Court at Fairbanks, Alaska, in which said Harry Havery, was plaintiff and Gus Peterson, E. T. Barnett, Henry Cook, J. C. Ridenour, John L. McGinn, and M. L. Sullivan were defendants, and which said suit was brought to recover damages against the defendants for trespassing upon certain mining claim owned by the plaintiff, being Bench Placer Mining Claim No. 2 on the right limit, below Discovery, on Dome Creek at Fairbanks' mining district of Alaska.

Second, That certain instrument signed by Sam Asheim, in which said Asheim acknowledged that the plaintiff, William Dettering, was the owner of a one-half interest in the \$17,500.00 worth of gold dust deposited in the Washington-Alaska Bank at Fairbanks, Alaska, and in which said Sam Asheim ad-

mitted that said suit brought by him, the said Asheim, was in fact brought in the interest of himself and the plaintiff, William Dettering, and which said instrument was delivered to and left with you by the plaintiff on or about the 7th day of February, A. D. 1910.

GRIFFIN & GRIFFIN,
Attorneys for Plaintiff.

Indorsed: Notice to Produce. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 23, 1915. Frank L. Crosby, Clerk. By E. M. L. Deputy.

VERDICT.

We, the jury in the above entitled cause, find for the plaintiff in the sum of \$6500. Six thousand five hundred dollars.

R. W. LITTLETON, Foreman.

Indorsed: Verdict. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 26, 1915. Frank L. Crosby, Clerk. By E. M. L. Deputy.

DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 23rd day of March, 1915, the above entitled cause came on for trial before the above entitled court, Judge Jeremiah Neterer presiding;

WHEREUPON, a jury having been duly and regularly empanelled, the plaintiff appearing therein by his attorneys, Messrs. Griffin & Griffin, and the defendant appearing by his attorneys, Farrell, Kane & Stratton, the following proceedings were had:

"MR. GRIFFIN: I want to file some papers served upon counsel that have not been filed yet. We served notice to produce certain papers, one of which was the

agreement signed by the owners that Mr. Roden should not settle the case for less than one hundred thousand dollars.

MR. KANE: There was never any such agreement. We have no such paper. We never had it, as we will show.

MR. GRIFFIN: We also asked you to produce the declaration of trust made by Mr. Asheim at the time the suit was brought in his name for the specific performance of the contract.

MR. KANE: We haven't the document you mention, but we admit such a document as this was once executed by Mr. Asheim to Mr. Dettering. As in the demand of counsel, counsel makes a demand that a second instrument signed by Sam Asheim, in which Asheim acknowledged that Mr. Dettering was the owner of the half interest in the seventeen thousand five hundred dollars in gold dust deposited in the Washington-Alaska Bank at Fairbanks, and acknowledged that Sam Asheim admitted that said suit brought by him was in fact brought by him in the interest of himself and plaintiff, we admit that there was such an agreement.

MR. GRIFFIN: You don't produce the one we ask for.

MR. KANE: No."

WILLIAM DETTERING, the plaintiff, a witness for himself, being sworn, testified as follows:

My name is William Dettering. I am the plaintiff in this case. My business is a miner, ever since I was eighteen years old; placer mining, and quartz mining occasionally. I went to Alaska in 1907, and have been there off and on ever since; 1907 in the summer time I went in there, and in the winter time I have been out here most of the time.

I bought from John Klonos his right to the option agreement made between him and Sam Asheim; that agreement was in writing. I have endeavored to find this agreement, but have been unable to do so. When

I came out of Alaska in 1912, in February, I delivered all my papers over to Mr. Roden. I do not know where that agreement is now.

MR. KANE: I will admit that Klonos assigned whatever interest he had in the seventeen thousand five hundred dollars to Sam Asheim, and Dettering, half each.

Q. Who was the owner of the entire interest of the seventeen thousand five hundred dollars in gold dust?

MR. KANE: We object to that as incompetent and immaterial. It is admitted here it was assigned by Mr. Klonos to Sam Asheim for the benefit of both.

THE COURT: He may answer the question, while it is a conclusion under the statements of counsel. Exception allowed. (St. p. 31.)

I was the owner of the entire interest in the \$17,500 gold dust. I told Mr. Roden before I came out of Alaska in the winter of 1910, that I owned the \$17,500 in gold dust. I told him Sam had not paid anything toward the purchase price of this gold dust. Mr. Roden was my attorney. I know that there was \$17,500 in gold dust, provided for in the agreement, deposited in the Washington-Alaska Bank at Fairbanks, Alaska, under this option agreement made between Klonos and Manson.

THE COURT: The witness may answer the other question as to what agreement he and Asheim had with relation to the ownership of this gold dust.

Q. You may answer now what agreement you had with Mr. Asheim as to the ownership of that seventeen thousand five hundred dollars in gold dust?

MR. KANE: Now, if your Honor please, I want to state further that Mr. Asheim is now deceased, and I object to this testimony on the ground that it is incompetent, irrelevant and immaterial, and he is attempting to testify against the interests of a deceased person, and as to what agreement they had between

themselves, your Honor, certainly we cannot be bound by it.

THE COURT: You say Asheim is dead?

MR. KANE: Yes, your Honor, Asheim is dead and I can prove that by the witness himself.

MR. GRIFFIN: This is not a suit against an estate.

THE COURT: The objection is overruled, in view of the conversation had with Mr. Roden at the time. Exception allowed.

Q. You may state what the agreement was between you and Asheim in regard to the ownership of the seventeen thousand five hundred dollars?

MR. KANE: We make the same objection.

THE COURT: The same ruling. Exception allowed.

A. Asheim was to own half of this gold dust provided he paid me half of fifty-five hundred dollars. I paid fifty-five hundred for this agreement, you see. Now, the gold dust was not in the bank when I paid it. It was during the panic and I borrowed the money from the New York Life Insurance Company.

MR. KANE: I object to this. I can understand why this story is attempted to be injected.

THE COURT: I permitted him to answer but he is going beyond that.

MR. GRIFFIN: Just state what the agreement was, when, if at all, he was to come in for his share?

A. If he wanted to come in he could pay half of the fifty-five hundred dollars, twenty-seven hundred dollars, and he would hold a half interest.

(St. pp. 32-33.)

There was no gold dust under that option agreement at that time. I did not know there would be the full \$17,500. It was a chance in mining, and you have to figure that you lose one out of three, and it was a business proposition with me; if a man makes one venture out of three he makes money.

Q. Did Mr. Asheim at any time pay to you half

the amount that you paid for the assignment of the option?

MR. KANE: I make the same objection.

THE COURT: Same ruling. Exception allowed.

Q. Did you ever tell Mr. Roden when he was your attorney that Asheim had never paid you any part of that consideration for the seventeen thousand five hundred dollars?

A. I told Mr. Roden the full particulars.

(St. p. 34.)

After this \$17,500 had been fully paid in under the agreement the gold dust was kept in the Washington-Alaska Bank at Fairbanks, Alaska. I borrowed \$8,000 there from that Bank. I gave the gold dust as security. I do not know what became of the gold dust. The note was put with the gold dust for security, and the gold dust was held as security for the note. Mr. de Journal afterwards took up the \$8,000 note; he was an attorney; and added interest and made out a new note for \$9,000.

MR. KANE: I cannot see the materiality of this and therefore I object to it.

THE COURT: Let him answer. Exception requested and allowed.

(St. p. 36.)

The new note was made for exactly \$9141.00.

Q. To whom was the new note made?

MR. KANE: I make the same objection.

THE COURT: He may answer. (Exception requested and allowed.)

A. To Mrs. de Journal.

Q. What was done with reference to the gold dust, with reference to this new note, if anything?

MR. KANE: We object to this as suggestive and leading, and irrelevant and immaterial.

THE COURT: Proceed.

(St. pp. 36-37.)

The note stayed right in the Bank; so far as I know the gold dust laid there too; it was the under-

standing that the gold dust should stay there until the note was paid, to secure the note given to Mrs. de Journal. Later on a suit was brought for specific performance on that contract between Klonos and Mark Manson; it was brought in the name of Mark Manson; it was brought to obtain possession of the gold dust. Mr. de Journal did get me to make an assignment.

A. This assignment is not like a bill of sale. If you give an assignment to collect money or the like of that, and Mr. de Journal got me to make an assignment, because I could not be sure of being there. I was on Dome Creek. We had twenty-four men working, and he said to assign it to Asheim, that is to Sam Asheim.

(St. p. 38.)

At the time of the assignment of the \$17,500 in Asheim's name I believe Asheim gave me a declaration of trust to the effect that it was made in my interest. Asheim was staying at Fairbanks at the time the suit was brought; he had a cigar store. I was sixteen miles from there, at No. 7 on Dome; I had a lease there; there were no railroad conveniences, I had to walk every foot of it. The assignment was made because it wanted an order of Court to get this released to put in the bank. Mr. de Journal was my attorney in that suit; that suit had not been finally determined when I left Fairbanks in 1910; you see it required an order of Court—that was all, there was no suit.

Mr. de Journal went outside, to 'Frisco; when he left Alaska he left his business in the hands of Mr. Nye. Mr. Nye had charge of that suit. When Asheim gave me this declaration of trust I kept it until I went outside; I then gave it to Mr. Roden because he got my power of attorney and I want him to look after my business until I came back. I told him there was a note at the Washington-Alaska Bank for \$9,100, and that had to be paid before the gold could leave the bank. I told him to look after my business in general, and he drew up the power of attorney himself; he said

the best thing to do was to make a general power of attorney, which he made out and I signed it.

(Plaintiff's Exhibit "A," being a certified copy of the power of attorney, is admitted in evidence without objection.)

(St. p. 40.)

The time I made this power of attorney Mr. Roden was looking after my business in Alaska; after I left there he had my power of attorney.

Q. Did you give him any directions to draw out the money?

MR. KANE: We make the same objection.

THE COURT: He may answer that now after the other testimony. Exception allowed.

I did not give him any directions to assign it to any person. I told him the gold dust was to remain there to secure the note; there was no other understanding between me and him. When I gave him the power of attorney I left for the States and I got back in about three weeks. I had some property here to look after, and made a flying trip. I was gone six weeks when I was back in Alaska; I didn't think it was safe for me to leave without a power of attorney. When I got back up to Fairbanks I saw Mr. Roden. I heard about some settlement of the suit that was pending in the name of Mr. Havery, and in which Mr. Roden was representing me and the other interested parties; I heard the rumor here in Seattle, but I wasn't sure and I didn't know a settlement had been brought about. I went back up there and had a conversation in regard to the \$17,500 when I went back, with Mr. Roden. You see, he blamed everything on Mr. Nye. The way he told me he said Nye released the gold dust and McGinn took it and put it in the pot. I naturally supposed that when Nye released it the note was paid. In an effort to find out what disposition was made of the \$17,500 of gold dust, I went to the Bank. I asked Mr. Roden at that time whether he had assigned away my interest in the gold dust and he said he had not.

I tried to find out and he told me Nye released it; the gold dust was there to secure the note—that is the note could not leave the bank; the gold dust could not leave the bank until the note was paid, and I was under the impression that the note was paid. Later on demand was made upon me for the payment of the note. I then had a conversation with Mr. Roden about it and he told me that Nye released the dust, that he had nothing to do with it and did not have it for collection; he told me that he had received nothing and had nothing to do with it. I then went to the Bank and tried to find out; I saw George Wesch, manager of the Bank, and inquired of him; he did not appear to know what became of the gold dust; I endeavored to find out whether there was any record in the Bank in regard to the disposition of the gold dust, but I could not find any record. I employed attorneys, Mr. Jennings and Mr. Pratt, in the way of searching the records in the Recorder's office at Fairbanks to ascertain what became of the gold dust. Mr. Jennings looked over the record and there was nothing of record. I went with him.

Q. Could you find a thing from any person in the bank or from Mr. Roden or anybody as to what became of your gold dust?

A. No, I could not.

Later on I went to Iditarod. I left there about the first of June, 1910; I saw Mr. Roden there and had a talk with him in regard to the gold dust; he always told me that he had nothing whatsoever to do with the dust; he settled the damage suit—that was all. He told me at Iditarod that he had nothing to do with it—that de Journal had it for collection, and that he blamed Nye; he said that he had nothing to do with it.

Later on a suit was brought by de Journal on the note. Shortly before that suit was brought in the Superior Court of King County, Washington, I went to Juneau to see Mr. Roden, and I talked the matter over with him there. I told him to give me a written state-

ment for my attorneys there and before I would bring any suit against de Journal, and so he did; he gave me a written statement. He told me he had nothing to do with the gold dust; that Nye released it—he told me that again; he made a statement for me at that time. This is the statement that he made; that is Mr. Roden's signaure at the end of the statement; it is in the same condition it was when I received it except for the marginal figures.

(Plaintiff's Exhibit "B," the same being the Statement received from Roden, referred to, is admitted in evidence and read to the jury.)

(St. p. 46.)

The Court then adjourned, taking a recess until Wednesday morning at 10 o'clock.

Wednesday morning—Mr. Dettering on the stand for further direct examination.

At the time Mr. Roden delivered to me the statement just read in evidence he made no statement as to whether or not he had signed away my right in the gold dust; he told me he didn't sign it away. That statement was made about six months before the trial of the de Journal case. Mr. Roden met in Mr. Griffin's office in Seattle, about ten days before the trial in the Superior Court of King County, and he dictated to Mr. Griffin's stenographer a statement of this de Journal case.

MR. GRIFFIN: I understand that you are willing that this shall go in?

MR. KANE: I am willing to admit it is some statement of this character, but not this one here.

MR. GRIFFIN: To avoid the calling of my stenographer as a witness I understand you are willing to admit Mr. Roden dictated some statement.

MR. KANE: Some such statement. That may not be the exact statement. We are not willing to admit that.

MR. GRIFFIN: Well, you admit it is substantially correct?

MR. KANE: In some things it is correct and in some things it is not correct.

Q. I hand you this purported statement, Mr. Detering, and ask you to refresh your memory, and from that statement refresh your memory. From that statement, state whether or not in my office in the city of Seattle, shortly before the case of de Journal against you as defendant was tried in the Superior Court of King County, Mr. Roden made a statement to you which you find in this statement.

A. Yes, he did.

Q. You have read that over, have you?

A. Yes, I have.

MR. GRIFFIN: We offer this in evidence.

MR. KANE: I am not objecting to the typewritten part on the ground that Mr. Roden didn't dictate it. Mr. Roden, we admit, did dictate some statement, but I do object to this pencil memorandum that was made by someone other than Mr. Roden, and that is attached to this typewritten statement. I don't believe that it should be admitted. Now, if they made those notes—(Addressing Mr. Griffin) You don't contend that Mr. Roden made those notes?

MR. GRIFFIN: Those notes are in my handwriting.

MR. KANE: I object to them as self-serving declarations and incompetent.

MR. GRIFFIN: If it is objected to for the reason that I did not call the witness' attention to each specific item the objection might be good. I find authorities which sustain such objection, but if counsel will waive that feature of it it will save time in the matter of examining the plaintiff.

MR. KANE: I am not raising the objection to the typewritten portion, but to this portion, I am.

MR. GRIFFIN: Then you are willing that the typewritten may be admitted?

MR. KANE: Yes, but not admitting that all the statements therein are correct by any means.

MR. GRIFFIN: With that understanding I will detach the pencil memorandum from the other, and offer the typewritten statement.

(The same was marked plaintiff's exhibit "C" and admitted in evidence.)

(St. pp. 48-49.)

Mr. Roden also stated at that time that Mr. Nye released the gold dust, and took the gold dust,—that is the gold dust in the Washington-Alaska Bank, amounting to \$17,500; at that time he also stated that Nye released it and gave it to McGinn. Mr. Roden stated that.

A. He told me that Nye released it and gave it to McGinn, as near as I can remember.

Q. Did he make any statement as to whether or not Nye knew that Asheim should have signed the note?

MR. KANE: We object to this as leading and suggestive.

THE COURT: He ought to know. Let him state what was said. Exception allowed.

A. Nye released the gold dust, the seventeen thousand five hundred dollars worth of gold dust, and he said Asheim should have signed the note.

Q. What else did he say?

A. And McGinn got the gold dust.

Q. What did he say, if anything, in reference to the note being secured?

A. The note was secured by the gold dust, this seventeen thousand five hundred dollars in gold dust.

Q. What did he say in relation to de Journal and Nye?

A. Well, that de Journal didn't protect me.

MR. KANE: This all goes in over our objection that it is incompetent, irrelevant and immaterial, and leading and suggestive.

THE COURT: Yes. Proceed.

MR. KANE: Note an exception.

THE COURT: Exception allowed.

Q. What did he say with reference to de Journal and Nye having charge of the seventeen thousand five hundred dollar suit? (St. pp. 50-51.)

Mr. de Journal had charge of the suit for specific performance of the contract. He made reference to Mr. Nye; Nye was de Journal's agent. He told me the money in the bank to my credit was for the settlement of the damage suit, which he said had been settled for \$62,500. He did not tell me at that time or at any time prior to the trial of the case in the Superior Court that he had released the gold dust or signed away my interest.

(The original assignment and deed is admitted in evidence, marked plaintiff's exhibit "D," and the signature thereto admitted by Mr. Kane to be that of Mr. Roden.)

MR. GRIFFIN: I desire to call the attention of the jury to the fact that this instrument has never been recorded.

MR. KANE: Hasn't it?

MR. GRIFFIN: The certified copy I got was not recorded.

MR. KANE: You may withdraw that statement. It was recorded.

THE COURT: What is the date?

MR. KANE: February 17, 1910. It was recorded two days after. How could you get a certified copy unless it was recorded?

MR. GRIFFIN: I got a certified copy, in answer to your question, from the clerk of the Superior Court after this was introduced in evidence. The certified copy does not show that it was recorded.

MR. KANE: That is the clerk's fault. That instrument was recorded. That is not our fault."

(St. 53-54.)

The parties named in this assignment and deed which was just read are the parties with whom I was litigating all this time on some of the ground, viz: E. C. Barnett, J. L. McGinn, M. L. Sullivan, J. C.

Ridenour, and N. L. Cook; those were the parties on part of the litigation. Mr. Roden made this assignment in my absence with the parties with whom I had been litigating. I talked with Mr. Roden as to whether or not I had a good defense to the Superior Court of King County; he told me I had a good defense. He said he would not be responsible for the money, and that Nye released the gold dust; and that he had the gold dust for collection.

Q. Who had it for collection?

A. Mr. de Journal, and he had Mr. Nye as his agent.

Q. Did you believe the statement Mr. Roden made to you?

MR. KANE: We object to that as incompetent, irrelevant and immaterial.

THE COURT: The objection is overruled. Exception allowed.

(St. p. 55-56.)

I made my defense to that suit because of the statement made by counsel to me.

Q. What expense were you put to in that suit for attorney's fees?

MR. KANE: We object to that as incompetent, irrelevant and immaterial. It does not constitute a cause of action against the defendant in this case, and I object to any evidence being introduced on this cause of action.

MR. GRIFFIN: The court passed upon that at the time of the demurrer.

MR. KANE: I must differ with counsel. The opinion of the court shows—

MR. GRIFFIN: The opinion of the court overruled the second amended complaint because the second cause of action—

BY MR. NEWCOMB: I presented that myself and your Honor will recall it.

THE COURT: There was not anything said

about the materiality of this testimony or expenses that were incurred.

MR. GRIFFIN: Here are the facts: (Argument continued.)

THE COURT: I think I will let this question be answered.

MR. KANE: I will ask for an exception.

THE COURT: Exception allowed.

Q. What expenses were you put to in that suit for attorney's fees?

A. Approximately a thousand dollars.

A. We have the receipts.

MR. KANE: Do I understand that these attorney's fees and expenses were in the suit in the Superior Court that you defended for him in the case of de Jorunel against himself?

MR. GRIFFIN: Yes, I assisted him.

MR. KANE: I think the proper way, if this evidence is admissible at all, would be to show what would be a reasonable attorney's fees, but not what he paid for it, and for that reason I object to this form of testimony.

THE COURT: The objection is sustained. Exception allowed.

(St. pp. 56-57.)

I paid approximately a thousand dollars costs in that suit.

MR. KANE: We object to that and move to strike the answer because he is including attorney's fees.

Q. The cost of the suit, and clerk fees, do you remember?

A. I don't remember. You have the receipt.

Q. Is that the receipt?

A. Yes.

Q. The receipt for the money you paid to the clerk?

A. Yes, \$9,341.00.

MR. GRIFFIN: You admit, do you, Mr. Kane,

that in that suit you were not entitled to interest in that note?

MR. KANE: I admit we got judgment in the suit, and the judgment was paid.

MR. GRIFFIN: That was the amount paid?

MR. KANE: I don't know what amount was paid. It was paid upon the judgment. That was a suit upon a promissory note. He is trying to prove what his expenses were in the suit of de Journal vs. himself. That was a suit upon a promissory note made by Mr. Dettering to Mr. de Journal.

THE COURT: If so, what the reasonable expenses were that he was placed to by reason of the statements of the defendant which led him to adopt the erroneous defense growing out of the matter which is alleged in this complaint.

MR. GRIFFIN: I think I have the receipt of the clerk for the money paid in.

MR. KANE: That is in payment of the judgment. I admit the judgment is paid.

THE COURT: Is that the judgment on the note?

MR. KANE: Yes, your Honor.

THE COURT: The objection will have to be sustained to that. That I assume cancels the note.

MR. KANE: Certinly, your Honor. I understand all this testimony has been stricken under my objection.

THE COURT: Yes.

(St. 57-58.)

I heard Mr. Kane's statement to the jury that his client and Mr. Havery paid into the Washington-Alaska Bank for my benefit sixty-five hundred dollars in one item; the \$4,554.50 is another item. When I went to the bank after my return from Seattle, I found there approximately \$11,054.50, the total of those two items which Mr. Kane stated had been paid in. I did not draw any checks or draw out any of that money which was paid in by Mr. Roden and Mr. Havery before I found the \$9,500 or a little over. When Mr. Roden was going to give me \$500 in Iditarod he said

it was attorney's fees for de Journal, and said that de Journal hadn't lived up to his agreement and was not entitled to it, and I told him de Journal was not entitled to attorney's fees and I would hold him for the money; that I would bring suit for the \$17,500, and Mr. Kane, I can prove to the satisfaction of the court and jury that I was thrown out of court bodily and Mr. Roden got the money. I did not draw out any money from the Washington-Alaska Bank which had been put there by Mr. Roden and Mr. Havery, aside from the \$9,500 that I afterwards found there; there was not as much as \$11,054 to my credit when I returned there. There was nothing in the records of the Washington-Alaska Bank to show where the \$17,500 in gold dust had been disposed of; I was unable to obtain any information as to how it had been disposed of.

CROSS-EXAMINATION, by MR. KANE:

No. 7 was about sixteen miles from Fairbanks, out beyond No. 5. I remember the time when Mr. de Journal saw me when he came by my cabin and asked me to come in and make an assignment of my interest in the \$17,500 in gold dust to Asheim for collection. I did not at that time because I was out on the creek and I had to walk in and out. Sometimes the railroad ran only part of the time. The railroad ran within one hundred yards of my house, but only one train a day; if the train was there I took it, and when it wasn't I walked. I didn't have to walk as I testified yesterday. When the assignment was taken from Mr. Klonos to Mr. Asheim the title was in my name.

Q. Isn't it a fact that the title was put in the name of Asheim?

A. It was in the assignment that de Journal got me to make for the collection of the money during my absence.

Q. When you bought Klonos' interest out?

A. That was just the money, the seventeen thousand five hundred dollars to be put in the Washington-Alaska Bank. These people owned the ground and I owned the gold dust.

Q. We agree upon that, but I am asking when that was done, the assignment was made from Klonas to Sam Asheim for you and Asheim?

A. Well, there was an assignment at first but it was transferred to me during the panic. I raised the money and borrowed it from the New York Life Insurance Company. I paid Klonos fifty-five hundred dollars.

Q. Isn't it a fact that Mr. Asheim bought the original option from Mr. Klonos, and afterwards took you in on the matter?

A. He did it in trust, that is all.

Q. He did it in trust and the title was in his name.

A. It was transferred to me.

(St. 63.)

I had a talk with Mr. de Journal about instituting this suit against Manson for the recovery of the \$17,500. Mr. de Journal was going to get an order from the Court and put it to my credit in the Bank. There would be no trouble whatsoever in getting the \$17,500. I was in de Journal's house with Asheim when they were preparing this Complaint in August, 1909, for Asheim to bring suit against Manson to get the \$17,500. I don't remember Nye being there at that time; I don't remember what the Complaint stated; but Asheim and I agreed that it stated what we thought the facts to be at that time; that suit was prepared at my request and Asheim's request at that time. I do not remember the day of the month. I never went to court after that on this suit that was started by Mr. de Journal; I believe Mr. de Journal appeared once, but we didn't have any trial on it.

Q. And did you consult with your attorney about how it was going along? If it was simply to go into

court and get an order, didn't you think it was strange that you didn't get this seventeen thousand five hundred dollars in gold dust from the 17th of August until the following spring some time?

A. Well, there is lots of times there is not court there and you could not get an order.

Q. But there was a court there in August, 1909, because you had other litigation there at the same time, didn't you?

A. Well, there was a number of other suits.
(St. 66.)

I did inquire why I didn't get the \$17,500 in gold dust; I asked Mr. Jennings, of whom I asked legal advice occasionally. In 1909, from the 17th day of August, after this Complaint was filed, up to the time of the settlement of all the claims, I asked Mr. Jennings and quite a number of attorneys; I talked about it you know; we talked about it to a number of people. I asked my attorneys, Mr. Nye and Mr. de Journal, if it only required an order of court, and they always had some excuse; they told me the whole property was in litigation and that was their excuse why the money could not be turned over. Mr. Roden was attorney for me on three or four matters in the summer of 1909 and in the fall of 1909, and along until 1910, and in these damage suits involving Lower No. 2 and Upper No. 2 and he was attorney for me and for Harry Havery and Cascaden, Gianakas, and all the other people fighting Barnett and the Cook crowd. I had nothing to do with No. 5. I did not ask Roden to prepare a suit to recover the \$17,500—that was de Journal, he had that No. 5. I didn't ask Mr. Roden to do any part of the litigation growing out of No. 5. Myself and my crowd were fighting Barnett and Cook and their crowd. Mr. Roden was with me and Mr. de Journal and the boys that were fighting the use of the ground by dummy locators, that is right.

I took a flying trip out here, and Mr. Roden suggested that I make a power of attorney; he said, "Don't

go away without leaving a power of attorney for some one to act for you." It was necessary for some one to have a power of attorney, even though I was only making a flying trip out, as that is natural for something happens I would blame myself. I thought I would take extraordinary precautions because everything was won. We had won all our cases slick and clean. I expected him just to protect me with the power of attorney. He was to account for all money that he signed away and all property sold, just like an honorable man should. Before I started out and before I gave Mr. Roden this power of attorney, Mr. Roden and our crowd had been negotiating with Barnett and his attorneys to settle the litigation. I left there about the 10th of February—something like that; I heard they started negotiations the day I left. It is not a fact that I had been talking with Harry Havery and Mr. Roden and Mr. Cascaden and all those men for over six weeks about a settlement of these cases; I surely would not have come out if it was a fact that the settlement was about to be made for about a week or two weeks previous to when I left. There was no negotiating whatsoever about a settlement for about six weeks before I left, and my people were not negotiating for a settlement with Barnett and his crowd on this Dome Creek litigation and there had been no talk about it when I left.

Q. Now, just answer the question. Now, there having been no talk over any settlement, why did you think it would be necessary that certain documents or deeds would have to be signed in your absence so that you would have to give a power of attorney to some one?

A. A man naturally gives a power of attorney so his business is protected.

Q. Did you ever, while in Alaska before, give Mr. Roden a power of attorney?

A. Well, in this case you know, I simply had to have somebody to look after my business.

(St. pp. 73-74.)

I never gave Mr. Roden my power of attorney before; he had been my attorney for a good while. When I went back there I stayed at the Golden Gate, I had a room there; I lived with Albert Arndt a little while in the fall.

Q. Isn't it a fact that you told Albert Arndt in Fairbanks after this settlement was made, that this settlement was satisfactory to you in every way, but that Sam Asheim should have paid half of the de Journal note?

A. I never said I got a settlement that was satisfactory. It was one of the rottenest I ever saw. The worst I ever saw.

(St. p. 75.)

It is not a fact that I told Arndt that spring that we all hoped they would get some money out of the settlement, but that I was well satisfied with everything, but that Asheim should have been obliged to pay half of the note out of the half of the gold dust that was in the Bank. I never said that there, and I never made any such statement at Iditarod. When I went back Mr. Havery told me about the damage suit and Roden told me he settled the damage suit, but he never told me about the gold dust.

Q. Didn't Mr. Roden tell you the gold dust had to be settled with all the other claims that were in litigation, that the settlements were compelled to be bunched together.

A. Yes, but that the seventeen thousand five hundred dollars went to me.

(St. 76-77.)

Mr. Roden didn't tell me anything about the settlement of the \$17,500; he said Nye released it and they flim flammed me.

Q. Did he tell you why he deposited to your account sixty-five hundred dollars in one check, and forty-five dollars in another?

A. That was supposed to come out of the damage suit.

Q. Did you ask Mr. Roden why he deposited the two checks in that way?

A. No, I didn't ask him.

Q. Did he tell you anything about why he deposited them in that way?

A. No, he didn't.

Q. Did he tell you anything about it?

A. No.

(St. p. 77.)

We examined the records and could not find whether the case was dismissed or not. This is a copy of the papers in the suit by Asheim against Manson for the \$17,500.

MR. KANE: This is a certified copy and I offer it in evidence.

MR. GRIFFIN: We object to it as immaterial, and it is certainly not proper at this time for him to go into his side of the case while our witness is on the stand.

THE COURT: Proceed. I will read it over.

(St. p. 78.)

Pretty near everybody said it was the rottenest settlement you ever heard of or saw, and I talked to Mr. Arndt about it, both at Iditarod in the spring of 1910 and in Fairbanks after I got back; I talked to a number of men, including David Cascaden; he didn't think it was a good settlement.

I went to Iditarod in 1910, and Havery and Roden went down too; there were a number of fellows on the boat, and I talked to them about the settlement; it was generally discussed that this Dome Creek litigation had all been settled at that time. Mr. Roden and I had a quarrel about it—about the settlement—about the damage suit, and I was not satisfied at that time. I went to the Bank to find out where the gold dust had gone to; I had a talk with George Wesch; he didn't

know. The Bank had no receipt and no information as to whom they had turned over the \$17,500.

Q. They simply opened the doors and let some one come in and take it away?

A. Well, that is what they done with the depositors' money. They have no record of the depositors' money, \$1,028,000 stolen, poor men's money, they are a bunch of thieves that ought to be behind prison bars.

THE COURT: Proceed. Now, don't do that again. I don't want to call your attention to it again.

(St. p. 82.)

Wesch said that the sixty-five hundred dollars and the forty-five hundred dollars, deposited in the Bank to my credit, was deposited by Mr. Roden in the settlement of the damage suit, and he could not tell me where the \$17,500 in gold dust had gone or who took it.

Mr. Roden didn't do any more business for me at all after this business here after the settlement of the suit; I just cut Roden out because I did not like his settlement of the damage suit, but I didn't know he had signed away my gold dust; I couldn't find out about the gold dust then, it was impossible. I didn't know that the suit that I started for the gold dust had been dismissed in court; Mr. Roden put it all on Nye; I didn't know it was dismissed immediately upon this settlement being made.

Q. You didn't know it was dismissed immediately upon this settlement being made?

A. No.

Q. Didn't you know the records in the Auditor's office there showed there was a deed, not only of your interest to "Lower Two" and "Upper Two," but also your interest in the gold dust?

A. No, "Lower Two" and "Upper Two," but not the gold dust.

Q. You knew it was of record as to "Lower Two" and "Upper Two?"

A. Yes, sir.

Q. But you didn't know it was of record as to the gold dust?

A. I didn't know it was of record. I would not be sure as to "Lower Two."

(St. p. 84.)

I had gone over the record personally with Mr. Jennings, as soon as I got to Fairbanks; I went right away with Mr. Jennings; I heard they had made a settlement and I asked right away what the terms were, and when I found that they had settled for less than \$100,000 I was altogether dissatisfied, because we had a written agreement that we would not settle for less than \$100,000. Mr. Jennings said he could not find anything of record about the \$17,500 in gold dust; I went to the Clerk's office to find out whether this suit was dismissed, and he said: "No, I fail to find it, I cannot find anything here." I talked with Mr. Nye, my lawyer, as to whether he knew anything about the dismissal, but I could not get any satisfaction out of him, and nobody gave me any satisfaction out of it. I went after Roden several times.

Q. Now, this settlement was made, as the records show here, in the spring of 1910, prior to February 19th?

A. Yes, sir.

Q. Now, you never sued against Mr. Roden, and never started a suit against Mr. de Journal for this seventeen thousand five hundred dollars until last year in this court?

A. I didn't know it.

Q. And you claimed all this time, since 1910, to be the sole owner of that seventeen thousand five hundred dollars gold dust?

A. Yes, sir, I was.

(St. p. 86.)

It was some time in the spring of 1912 that Mr. de Journal brought suit against me in the Superior Court of King County for \$9,000, and it was conclud-

ed last year, and shortly after that suit was concluded I brought this suit against Mr. Roden.

Q. Did you ever make a claim against Mr. de Journal for this seventeen thousand five hundred dollars before Mr. de Journal started the suit against you, that is on the note?

A. Well, I always thought Mr. de Journal got his note paid, and he had the money for collection and he had the gold dust for security.

(St. p. 87.)

I did not know that de Journal had not been paid in Alaska. The de Journal had been presented to me there for payment, but when the security is back of the note, that is not proof that a thing isn't paid. I knew he was making claim against me after this settlement was made, and I made a claim against him for the \$17,500.

Q. Did you ever bring a suit, or write him a letter or make a claim personally for the seventeen thousand five hundred dollars?

A. I did.

Q. When did you make the claim?

A. We brought a counter-claim for the seventeen thousand five hundred dollars in the suit for the note.

Q. And that is the first time you ever brought it?

A. Yes, and I found out right in court that Mr. Roden had signed away——

(St. p. 88.)

RE-DIRECT EXAMINATION, by MR. GRIFFIN.

For a large portion of the time after the defendant signed away my gold dust Mr. de Journal was in San Francisco and in Paris, and Mr. Nye was only his agent representing him when he was out. After the assignment of the gold dust I was in Seattle, then in Fairbanks, and then I went to Iditarod for about eighteen months. The suit by de Journal was determined in 1913.

Charlie Schafer, Hilcher, Cascaden, and Gianakas did not think the settlement was a good one; the general talk around Fairbanks was that the settlement was not a good one. (Witness excused.)

M. T. BRIGHTMAN, a witness for the plaintiff, being sworn, testified as follows:

I am a lawyer, since 1903; I have been in the city of Seattle all the time. I was one of the attorneys for the defendant, William Dettering, in the suit brought in the Superior Court by one Fernand de Journal to recover on a note for ninety-one hundred and some odd dollars; I took part in the preparation of that suit for trial and in the conduct of the suit for the defendant.

Q. Do you know what would be a reasonable sum to charge as an attorney's fee for the work done for the defendant in that case?

MR. KANE: We object to that on the ground that it is incompetent, and immaterial, and it is not within the issues of this case, and on the further ground that the second cause of action alleged in the complaint, to which this refers, does not state any facts sufficient to constitute a cause of action against the defendant.

THE COURT: He may answer. Exception allowed.

A. Yes, I have an opinion as to what would be a reasonable fee.

Q. What in your opinion would be a reasonable fee?

MR. KANE: We make the same objection.

THE COURT: Objection overruled. Exception allowed.

A. I think one thousand dollars would be a reasonable fee.

(St. pp. 92-93.)

CROSS-EXAMINATION by MR. KANE:

That is not what you charged then? I do not know what the legal expenses of Mr. Dettering were

in that case for my office and Judge Griffin's; I know what mine were.

RE-DIRECT EXAMINATION by MR. GRIFFIN

Plaintiff's Exhibit "E," the assignment referred to, admitted in evidence; signature of Mr. Roden thereon admitted by Mr. Kane.

MR. GRIFFIN: We offer it in evidence. This is the assignment which disposes of the seventeen thousand five hundred dollars in gold dust specifically, which was introduced in the trial in the Superior Court.

MR. KANE: I have no objection to it, but I object to the statement of counsel that it refers to the assignment specifically.

THE COURT: Yes, it speaks for itself.

(St. 94.)

Exhibit E read to the jury.

Mr. Griffin then read to the jury certain interrogatories as follows:

"Int. No. 1: Is it not a fact that you were the attorney for the plaintiff in that certain suit in the District Court of the Territory of Alaska, Fourth Division numbered 1343, entitled Harry Havery, plaintiff, vs. Gus Peterson, E. T. Barnett, Henry Cook, J. C. Ridenour, John L. McGinn, and M. L. Sullivan, defendants:

Ans. to Int. No. 1: Yes.

Int. No. 2: Is it not a fact that the said Harry Havery referred to in the preceding interrogatory as such plaintiff in said suit referred to in the preceding interrogatory was trustee, and that such suit was brought in the interest of said Harry Havery, Sam Asheim, H. D. Cascaden, J. F. Hilcher, James Giana-kas, and William Dettering?

Ans. to Int. No. 2: Yes. Said suit was brought for the benefit of the persons named, and one Charles Schiek.

Int. No. 3: Is it not a fact that the suit referred

to in the two preceding interrogatories was brought by the plaintiff Harry Havery in his own behalf, and on behalf of the other persons named in the next preceding interrogatory to recover damages for gold dust unlawfully mined and taken from placer mining claim, bench claim No. 2, right limit, below Discovery Dome Creek in Fairbanks Mining District, Alaska?

Ans. to Int. No. 3: Said suit was brought to recover damages for gold dust extracted from claim known as "Upper No. 2" below Discovery, on said Dome Creek.

Int. No. 4: Is it not a fact that in the fall or winter of 1909 that Harry Havery, Sam Asheim, H. D. Cascaden, J. F. Hilcher, James Gianakas and William Dettering authorized you in writing to settle said suit for the sum of One Hundred Thousand (\$100,000) Dollars and for no less than the sum of One Hundred Thousand (\$100,000) Dollars?

Ans. to Int. No. 4: No.

Int. No. 5: If you answer the preceding interrogatory in the affirmative, please attach to your answer to these interrogatories the original of such agreement or a true copy thereof."

MR. GRIFFIN: The answer to No. 5 is a string of dashes.

MR. RODEN: There is no such document so I could not attach it.

"Int. No. 6: Is it not a fact that you had no authority from William Dettering to settle said suit numbered 1343 referred to in the preceding interrogatory excepting the instrument referred to in the next preceding interrogatory?

Ans. to Int. No. 6: It is not a fact.

Int. No. 7: State what consideration was received by the parties interested in the settlement of said suit numbered 1343, referred to in the preceding interrogatories and what portion of the consideration of said settlement was paid by you, if at all, to the plaintiff, William Dettering?

Ans. to Int. No. 7: This suit was settled together with one other suit for a certain total consideration, the exact amount of which I cannot recall, but the books of the Washington-Alaska Bank show the total received, one-half of this total sum, as near as I recollect, was applied to the satisfaction of the suit referred to in this interrogatory.

Int. No. 8: What interest did William Dettering have in Bench Placer Mining Claim No. 2, on the right limit, below Discovery on Dome Creek, being the claim referred to in the preceding interrogatories at and before the time said suit was settled?

Ans. to Int. No. 8: I don't know.

Int. No. 9: Was William Dettering, the plaintiff, indebted to you in any sum on the 7th day of February, A. D. 1910?

Ans. to Int. No. 9: It is my opinion that he was.

Int. No. 10: Is it not a fact that on or about the 6th day of February, A. D. 1910, William Dettering, the plaintiff, informed you at your office at Fairbanks, Alaska, that the foreman who had charge of the mining then being done upon Bench Placer Mining Claim No. 2 right limit, below Discovery, on Dome Creek, estimated there was Sixty Thousand (\$60,000) Dollars in gold dust then mined and in the dump upon said claim?

Ans. to Int. No. 10: I don't know.

Int. No. 11: Did you know that the plaintiff, William Dettering, owned any interest in the Seventeen Thousand Five Hundred (\$17,500) Dollars in gold dust deposited in the Washington-Alaska Bank at Fairbanks, Alaska, at the time a suit was brought in the name of Sam Asheim, as plaintiff, to recover the possession of said gold dust?

Ans. to Int. No. 11: I did.

Int. No. 12: Is it a fact that while the suit, referred to in the preceding interrogatory was pending in the United States District Court, of the Territory of Alaska, Third Division, said Sam Asheim made

a declaration of trust in which said Sam Asheim admitted that said suit was brought wholly or partially for the benefit of William Dettering, the plaintiff in this action?

Ans. to Int. No. 12: Said Asheim declared that Dettering was the owner of an one-half interest in the subject matter of this suit.

Int. No. 13: Is it not a fact that the declaration of trust, referred to in the preceding interrogatory was delivered by William Dettering, the plaintiff, to you at your office in Fairbanks, Alaska, upon the same day that William Dettering made to you a power of attorney?

Ans. to Int. No. 13: Said declaration was delivered to me.

Int. No. 14: If you answer either of the two last preceding interrogatories in the affirmative, please attach to your answers either the original of such declaration of trust or a true copy thereof.

Ans. to Int. No. 14: Said declaration is not now in my possession. It stated that Dettering was the owner of one-half of the gold dust for which said suit had been brought.

Int. No. 15: What directions and instructions were given you by the plaintiff, William Dettering, at the time he executed to you the power of attorney on the 7th day of February, A. D. 1910?

Ans. to Int. No. 15: No particular instructions or directions were given to me.

Int. No. 16: What amount was paid by you to the plaintiff, William Dettering, upon his return to Fairbanks, Alaska, from the State of Washington in the spring of 1910?

Ans. to Int. No. 16: I paid him nothing upon his return, as near as I can recollect. All amounts to which he was entitled were turned into his account immediately after settlement was made and when the funds were distributed to the respective parties. The

books of the Washington-Alaska Bank show when these sums were turned into his bank account.

Int. No. 17: What item makes up the difference between the amount received by you for Mr. Dettering from the settlement of that certain suit brought by Harry Havery et al, plaintiffs against Gus Peterson et al, defendants in the District Court of Alaska, Fourth Division, numbered 1343, and the amount you paid to William Dettering upon his return from the State of Washington to Fairbanks in the spring of 1910?

Ans. to Int. No. 17: This item is made up of two amounts—one being the amount received by Dettering as a party interested in a suit brought by Havery against Barnett, Cook, Ridenour, McGinn, Sullivan and Yarnell, and the second represents one-half of the proceeds of the gold dust.

Int. No. 18: Set forth in your answers to these interrogatories a true and accurate account between yourself and the plaintiff, William Dettering, giving an accurate account of all sums received by you in which the plaintiff, William Dettering, was interested and which belonged to him, and all sums paid out by you for him between the date of February 7th, 1910, and the date upon which you paid Mr. Dettering upon his return from the State of Washington to Alaska in the spring of 1910?

Ans. to Int. No. 18: There was no account kept.

Int. No. 19: In what suits pending in the District of Alaska in which the plaintiff, William Dettering, was interested in did you appear as attorney, and whom did you represent in each of said suits?

Ans. to Int. No. 19: One suit entitled "Havery vs. Peterson et al.;" one suit entitled "Havery vs. Yarnell et al.;" one suit entitled "Cook vs. Havery et al.;" and one suit brought by "Cook et al vs. Klonos et al." In the first two I represented the plaintiff, in the last two the defendants. The first two were for trespass on Upper and Lower No. 2 below Discovery on Dome

Creek; the third involved the title to Upper No. 2 below Discovery on Dome Creek; and the fourth involved the title to the ground from which the gold dust had been extracted.

Int. No. 20: Did you have authority to represent and did you represent, William Dettering in all matters at Fairbanks, Alaska, from the 7th day of February, 1910, until Mr. Dettering returned to Fairbanks, Alaska, in the spring of 1910?

Ans. to Int. No. 20: I represented Dettering in all law suits in which he was interested.

Int. No. 21: What directions, if any, were given to you by the plaintiff, William Dettering, authorizing you to settle, sign away and dispose of the seventeen thousand five hundred dollars in gold dust in the Washington-Alaska Bank, at Fairbanks, Alaska?

Ans. to Int. No. 21: No particular directions were given me.

Int. No. 22: How much cash, and what other consideration was paid to you in settlement of all suits settled by you in the winter of 1910, in which the plaintiff, William Dettering, was interested?

Ans. to Int. 22: A cash settlement was made to the satisfaction of all interested parties and this was immediately distributed among the several parties. The entire amount was placed in the Washington-Alaska Bank, and the books and records of said bank show what disposition was made of them, besides the total amount paid. There was no other consideration received either by me or any other person.

Int. No. 23: Is it not a fact that at the time Sam Asheim instituted a suit to enforce the specific performance of the contracts executed by John Klonos and assigned to Asheim and Dettering, that said Asheim made and executed an agreement or declaration of trust in which Sam Asheim claimed that William Dettering was the owner of one-half interest in the mining property involved in the suit, and also in the seventeen thousand five hundred dollars in gold

dust, which was deposited in the Washington-Alaska Bank?

Ans. to Int. No. 23: The only thing involved in this suit was the gold dust. Asheim made such a declaration, that is, that Dettering was the owner of an one-half interest in the subject matter of this suit?

Int. No. 24: What portion of the proceeds of the seventeen thousand five hundred dollars in gold dust ever came into your possession, and what was done with the same?

Ans. to Int. No. 24: No portion of said gold dust ever came into my possession. The proceeds thereof were placed in the Washington-Alaska Bank to the credit of Asheim and Dettering in equal shares. This transaction is evidenced by the books and records of the Washington-Alaska Bank, through which bank all money was received and disbursed."

MR. GRIFFIN: Have you the deposition of Mr. Wesch, Mr. Clerk?

MR. KANE: While Mr. Griffin is getting that I want to call your Honor's attention to the exhibit I offered in evidence as part of the cross examination.

THE COURT: I don't think it should be admitted.

MR. KANE: I will ask for an exception.

THE COURT: Exception allowed.

MR. KANE: We would like to publish all the depositions at this time.

THE CLERK: They have been published.

MR. GRIFFIN: You admit the total amount deposited in the Bank to the credit of Mr. Dettering, is the amount shown by Mr. Stewart's deposition?

MR. KANE: Whatever Mr. Stewart's deposition shows, I suppose will be correct.

MR. GRIFFIN: And that the balance in February was reduced to \$9,551.00?

MR. KANE: Yes.

MR. GRIFFIN: Then it is admitted that the amount deposited in the Washington-Alaska Bank by

the defendant and Mr. Havery to the credit of the plaintiff, Mr. Dettering, was two amounts, one for sixty-five hundred and one for \$4,554.50, and that the account, the balance of the account on the 9th of March was \$9,509.50.

MR. KANE: Yes, and that the amount was afterwards taken out by Mr. Dettering. He so testified to that.

MR. GRIFFIN: The plaintiff will rest, unless there is something I have inadvertently omitted.

MR. KANE: I would like to address a motion to the Court and I think the jurors should be excused.

THE COURT: The jurors may be excused for a few moments, and will remain within call. (Jury retired.)

MR. KANE: At this time, on behalf of the defendant, I desire to interpose a motion challenging the sufficiency of the evidence introduced by the plaintiff to make out a cause of action on his first cause of action, and also I challenge the sufficiency of the complaint as not stating facts sufficient to constitute a cause of action; and those two motions I make also as to the second cause of action; and I further move to have the case dismissed at this time because it appears from the complaint itself, and from the evidence now in, that both causes of action, the first cause of action, and of course—that failing, the second cause of action will fall, are barred by the Statute of Limitations, of the Territory of Alaska, and that the plaintiff was guilty of laches if he ever had any cause of action against Mr. Roden.

It appears from the complaint that the action is barred, and the Statute is pleaded by Judge Griffin. The whole Statutes were set up in the pleadings.

(Argument followed.)

THE COURT: I think there is a difference between these two instruments here with relation to the matters to be transferred. These instruments were drawn up and acknowledged the same day before the

same notary public, and they have the same covers upon them, and they are written upon the same type-writing paper. Upon an issue we would have to determine they pertained to two different matters. One in a general sort of way refers to money on deposit. It doesn't refer to the gold dust, and the court could not find that gold dust is money, and that money is gold dust; they are not synonymous, and the other instrument makes specific mention of the certain option which they have here—

MR. KANE: They mention the Manson option in the first one.

THE COURT: They do in a general way. The other option is not in evidence so I cannot determine that this is it, and under the pleadings here the Statute of Limitations is not raised.

MR. NEWCOMB: I would like your Honor to hear from me a moment before you finally rule upon it.

THE COURT: Unless you have authority which bears directly upon it I don't care to hear further.

MR. NEWCOMB: He has pleaded the Statute of Alaska, and he has not proved the Statute of Alaska at this time, so that as far as this motion is concerned he has not proven his case.

THE COURT: You have not raised the Statute of Limitations by your pleadings. That is it. In the absence of any Statute of a foreign State the court would presume it was like our local Statute, so that there is not any presumption in the matter suggested, but as I said a moment ago, in analyzing these instruments, that it is not for the court to say that the gold dust was transferred under the first instrument, under the view that the other instrument was executed at the same time, that is, that it was transferred in a general way, and then in a specific manner, and under the matters before the court now, the court will have to deny the motion.

MR. NEWCOMB: If your Honor holds we cannot raise the question of the Statute of Limitations

because we did not demur to the second amended complaint—

THE COURT: You could raise it by answer.

MR. NEWCOMB: You can raise it by demurrer to the complaint as it now stands. Now, we did not demur. It is my understanding of the practice in this State that we do not have to demur to raise that question later by challenge to the introduction of any evidence, which was done at the opening of this trial, and also for a motion for dismissal as we are now making at the close of the plaintiff's case.

THE COURT: You are wrong. The State of Washington gives a number of grounds for demurrer. Those grounds can be taken advantage of or waived, and upon the question that the complaint does not state facts sufficient to constitute a cause of action, the question can be raised at any time, it can be raised by demurrer or by answer, so that a person cannot demur at any time during the course of a trial, but he can simply object on the ground that the complaint does not state facts sufficient to constitute a cause of action. But the other grounds of demurrer must be taken by demurrer or by specific pleading.

MR. KANE: At this time I ask of the court the privilege of amending my answer to raise the question of the Statute of Limitations. The Statutes are pleaded by the plaintiff and it is no surprise to counsel for plaintiff.

MR. GRIFFIN: We object to that very strenuously.

THE COURT: It may be allowed.

MR. GRIFFIN: We will ask for an exception.

THE COURT: Exception allowed.

MR. KANE: Then I will prepare the amendment and file it in the usual way. Now, does your Honor overrule my motion?

THE COURT: Yes, in view of the instruments. The court cannot say at this time that the plaintiff did have notice.

MR. KANE: We will ask for an exception.

THE COURT: Exception allowed.

(St. pp. 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107.)

FERNAND DE JOURNAL, a witness called on behalf of the defendant, being sworn, testified as follows:

I am an attorney-at-law. I practiced in Alaska, at Fairbanks, in the year 1909, and for some years previous thereto. I am acquainted with William Dettering. I was acquainted with Sam Asheim in his lifetime, having known both of these gentlemen at Fairbanks. My wife at one time held a note of William Dettering's; it was endorsed to me and I held it for her. At the time the note was given no security was given me by William Dettering, either for myself or for my wife. Mr. Dettering is mistaken when he says that certain gold dust in the Washington-Alaska Bank was given as security for that note; such gold dust was never put up as security for that note. The note was executed by Mr. Dettering to my wife on or about the 11th of August, 1909. Upon my getting the note it was not immediately put in the Washington-Alaska Bank; some time after I got it, I left it in the Bank for collection, and then I came outside. He gave me no other security for the note; there was no need of security if he paid it before I came out. I was coming out in September; the note was given in August. He was to realize something on his securities here if he failed to pay the note, and in the event he didn't do that he was to come out at the time I did, and give me a mortgage on a house he had here in Seattle that was furnished and that he was renting furnished, he told me; also some stock in the Scandinavian-American Bank, and other securities he told me he had. The other was the Alaska Building, but I am not so sure about that. He was to give me the stock in the Scandinavian-American Bank and also the mortgage or bill

of sale of his house, somewhere on 12th Avenue, I think it was.

I had a talk with Mr. Sam Asheim in Alaska. I am familiar with the ground known as the Dome Creek property, having had considerable litigation for parties in that. I remember claim No. 5. I remember the Klonos-Manson option; I was not attorney in that case—Mr. Coosby was. Sam Asheim is now dead; he lived in Fairbanks at that time; he was a mining partner of Mr. Dettering. I had a conversation with Mr. Asheim about his holding an interest in the Klonos-Manson option; this conversation, in which their relations were discussed, was held with Mr. Dettering and Mr. Asheim together. The first conversation was in 1908, and I should think, as far as I can recollect, it was when Mr. Asheim, Mr. Dettering and I were in Mr. Asheim's cigar store, when Mr. Asheim introduced Mr. Dettering to me as his partner in "No. 5," having bought No. 5 with him. I would not be positive that was the first time I met Mr. Dettering, but I know about that conversation because I thought it was a risky business. Down to the time that the suit was instituted by Asheim against Manson I had many conversations after that first one with Asheim and Dettering together in which the partnership in the interest in No. 5 was discussed; I had a conversation with Mr. Asheim as to his purchasing and paying for \$17,500 gold dust that might be brought out of the Klonos-Manson option. That was before Dettering purchased. When Asheim purchased he purchased alone, and then he sold to Dettering.

Q. What conversation did you have when Asheim purchased it?

A. Klonos was indebted to Asheim for two thousand dollars money loaned and Asheim wanted to get square, and therefore he purchased "No. 5" for that business and then got Dettering to buy in with him. I suppose he gave him cash, as he explained to me. Asheim had no cash only he had advanced that to

Klonos, and in order to get square on the proposition he entered into an agreement with Klonos to purchase No. 5 and then got Dettering to put up some money towards the purchase and complete the payment so to speak.

(St. pp. 114-115.)

The next time I talked with Asheim about his purchase Mr. Dettering was present. At that time Asheim told me, and some time—say two or three months afterwards, or maybe a month afterwards, he and Dettering told me of their coming purchase.

A. Well, as far as I can recollect Asheim told me, that, and some time, say two or three months after, or maybe a month after, he and Dettering told me of their coming purchase and perfecting the purchase of that claim for which Dettering as I recollect paid some three thousand or thirty-five hundred dollars, and Asheim had already a couple of thousand dollars in it, and that was the purchase price of their seventeen thousand five hundred dollar equities.

(St. p. 115.)

I knew the question involved in the title to No. 5, as I did all of One, Two, Three, and Four. They were all under the same contention; the whole of those individual claims had been re-located by the Dome Group Location; the title to No. 5 was exactly the same as the title to the others, except that there some complications about No. 5 that did not enter into the others; while we had possession of One, Two, Three, and Four, we did not have possession of No. 5. Manson was in possession of No. 5, and he was the agent of Captain Barnett, and there is a difference there. I remember in the summer of 1909 there was a suit prepared by Sam Asheim against Manson for this \$17,500 gold dust. I did not tell Mr. Dettering that there was nothing to do to get this \$17,500 but to go into court and get an order and take it out. The suit was prepared in my house in Fairbanks, Alaska; Mr. Dettering, Mr. Asheim, Mr. Nye, and myself were

present. The title to the option, the assignment from Klonos, stood in the name of Sam Asheim; it was in that name from the time the title left Klonos. This is the complaint in the case Asheim vs. Manson; it is the complaint prepared by me at that time in the interest of Mr. Dettering and Mr. Asheim.

MR. KANE: We offer this in evidence.

* * * * *

Mr. Nye was the attorney in that case for Mr. Asheim?

A. Yes, sir.

Q. Mr. Asheim and Mr. Dettering were with you in preparing this complaint, were their respective rights in this seventeen thousand five hundred dollars gold dust as to what the interest of one or the other had in it?

A. I thought the way the matter—

MR. GRIFFIN: We object to what he thought.

Q. What I mean is what interest did each of these men hold in it?

A. Half.

Q. Half each?

A. Yes.

(St. 117.)

They were there talking and preparing this complaint, and at that time there was no claim made by Dettering that Asheim owed him one-half of the \$5,500 which he claimed was paid for the interest in this option. I never heard it claimed by him up there. I never advised Mr. Dettering that there would be no litigation on this matter of getting the \$17,500. I put it in the hands of Mr. Nye because I was coming out and I knew it would be a hard fight; in this litigation involving the title to this property I represented Burke and Jantala on No. 1; on No. 3 I represented Stafford; on No. 4 I represented Nathan Zimmer and Prosser; these suits were commenced in 1905, and that property was in litigation from that time on until this settlement.

CROSS EXAMINATION by MR. GRIFFIN.

Q. This certified copy of the complaint which was shown to you, paragraph five reads as follows: "That since the 15th of October, all suits, actions, and adverse claims existing after said first day of September, 1906, against said undivided one-third interest in said claim, or any part thereof, had been settled and finally determined." Was that true?

A. Well, at that time it was more true than it is now, because that had been modified by the Circuit Court of Appeals in the two hundred Federal, page 700, I think. (St. 120.)

At the time this was drawn up everything in connection with it was not settled; there was a judgment of dismissal, a decree forming a judgment of dismissal, but that was dismissed without prejudice and they could bring a new suit if they wanted to; that is an allegation we often put in a complaint. We advised and worked on this complaint for Asheim and Havery every day for a month. We had a great deal of litigation; there were a great many assignments of the Twos and Five, and trespasses on the ground.

A certified copy of the complaint is received in evidence, marked defendant's exhibit "1."

I had something to do with the trespass suit, and when I was answering this question I thought counsel was referring to the litigation Dettering, Asheim, and Havery were in at the time; no this complaint is not taking a month alone.

Q. And at that time you alleged here that everything was settled and the money had to be paid over?

A. That is an allegation we put in the complaint.

Q. You would not bring that suit and allege that everything was settled if it was not true?

A. I will answer that if the court will allow me to explain. These suits had to be brought to a head. We had five years' litigation on those, and owing to the fact that the judgment of dismissal by the court below,

the court in Alaska, was a judgment without prejudice, we knew we would have to go all over it again, and I advised that the sooner it would begin the sooner it would be ended, and therefore to enter it at once, otherwise it might not be settled now, but I thought that would be brought to a focus, and we would either get a settlement or a judgment that would wind it up, and that is my reason for alleging this.

(St. 122.)

That was my contention at the time; our only purpose in bringing the suit was not to get the attorney's fees of \$1,000. I did not ask for the suit—they brought it to me. I had a case against Mr. Dettering in the United States Court, and have a suit pending against him now. I am the same de Journal who was urging Mr. Roden to bring a suit upon that note in Alaska. I tried to collect my money a long time.

Q. And you are the same de Journal referred to when he says that I have always declined to do so, saying that "I have always declined to do so, because Mr. Dettering's statement would be taken in preference to his"?

A. Maybe so, at that time it might, but not now.

Q. And that is up in Alaska where you and Dettering were known?

A. That is where I defended him for assault with attempt to murder.

(St. 123.)

Right after the trial in Judge Tallman's court I had a conversation with Mr. and Mrs. Dettering. I did not tell them in that conversation that Roden had beaten them out of \$40,000. I did not tell Mrs. Dettering that I had to bring suit against her husband for this note, and that I hesitated to bring suit against her husband for this note; neither did I tell her that I always thought he had drawn out the \$17,500 gold dust deposited in the Washington-Alaska Bank at Fairbanks. I knew the gold dust was not there to se-

cure the note, and I knew that he hadn't drawn it out either.

On RE-DIRECT EXAMINATION by MR. KANE, the same witness testified:

If the gold dust had been there as security for the note I would have drawn it out before I went outside and got my fee before I went. (Witness excused.)

JOHN L. MCGINN, a witness for the defendant, being sworn, testified as follows:

I am a lawyer, and since 1900 I have practiced in the Territory of Alaska. I know a good deal about the property we have been talking about here, and I had a number of cases involving the title to it. I know Mr. Roden and Mr. Dettering. We were all connected with the cases started by Harry Havery as trustee for certain people for "Lower No. 2" and "Upper No. 2" on Dome Creek. I was attorney for the defendants in those actions. The suit was brought against Peterson and Peterson had a lease on Lower No. 2 and was working on that lease; I represented them in the action; they were there as our lessees and I was interested in the ground. That first suit involving the title to the Dome Creek Group Association was brought on the 20th of April, 1905; I think the notice of relocation was recorded on the 17th of April, 1905, and shortly after, after the perfecting of the location by the filing of the notice of location I brought suit on behalf of the Dome Creek location against the people claiming adversely. That suit affected No. 1, No. 2, No. 3, No. 4, and No. 5 in the middle (indicating on the map), the other I think represents the Creek claims; the Dome group was a mile in length here, 160 acres, and we staked 1320 feet wide; it came down here and took in No. 5.

I was familiar with the option agreement that was executed by John Klonos to Manson on No. 5.

(Certified copy of option agreement offered in

evidence, marked defendant's exhibit "2," and entered without objection.)

The final case in this litigation was decided about May, 1912, by the Circuit Court of Appeals. We tried the case before Judge Gunderson, in 1907; the suits began in 1905, including the suits started by Mr. Havery on "Lower No. 2" and "Upper No. 2"; we finally settled in 1910, with the exception of the Roney case; there were two or three settlements, the last settlement in February, 1910, with Havery and Roden and their associates; we were negotiating a month or two when this litigation was finally settled; the claims of Harry Havery and his associates were all turned over to us in 1910.

Plaintiff's exhibit "B" is the settlement we entered into whereby they transferred all their right, and what adverse interest they claimed in the Dome Creek Association to us. It was recorded on the 19th of February, 1910, and afterwards returned to my office.

Q. How many Manson agreements, or options, were there affecting the title to the property or moneys that were affected by the settlement of this litigation? * * *

A. There was only one Mark Manson, and that is the option he obtained from John Klonos.

Q. On what property?

A. On No. 5, and which was in fact held by the people I represented there. Manson took the option for the benefit of my people.

(St. pp. 130-131.)

This is the option that affected the \$17,500 in gold dust; there was no other option or agreement of any kind involved in the settlement that involved the name of Manson.

Referring to plaintiff's exhibit "D," that instrument contains a description of all the property that was affected by this settlement; plaintiff's exhibit "E" is an agreement made at the same time; these papers were all drawn by me; plaintiff's exhibit "D" took

in the Twos, for which I got separate deeds; then I had that general agreement, which included everything. I did not want to go to the expense of recording those others, viz: plaintiff's exhibit "E" and we got an assignment of the gold dust and a deed for this particular piece of property, and then a deed for the Twos and the Coosby Fraction and all the property included here. I did that as a matter of precaution; so I have a number of separate deeds covering the other properties, which are not recorded. I had these papers in my possession up to the time of the de Journal suit, when I sent them to you at your request. I know the amount that was paid in the settlement of this litigation that is involved in the property described by plaintiff's exhibit "D". I made the settlement, and I paid out the money myself. The total amount paid out was \$49,500.00, and we took the gold dust—it was covered in that assignment. I gave two checks to Mr. Havery and Mr. Roden jointly; one check was for \$36,500, and the other was for \$13,000; we settled for the gold dust on the basis of \$13,000; we settled the damage suit for \$36,500 (for "Upper Two" and "Lower Two").

I heard Mr. Dettering's testimony that the title to No. 5 was clear, at least as to the gold dust; all that was necessary was to go to court and get it; the facts as to the title to that gold dust are: we had the title—at least we thought we had, and we had the title to the ground; it was in litigation, but he had no chance for it. I am familiar with the litigation and was all through it; there was no time up to the making of the settlement that the title to No. 5 was clear; there was no time up to the settlement that the money could be paid out under the Klonos option agreement which provided that it could not be paid out until the title was clear; one part of the litigation could not be settled without the other; I refused to settle unless the whole thing was cleaned up—that is the Twos and the whole thing; we had already settled One, Three, and Four, but I said at that time,—“We will clean up the

whole business or I won't talk to you," and finally we got to terms and cleaned up the whole litigation.

On CROSS EXAMINATION by MR. GRIFFIN, the witness further testified:

In 1905, at the time this property was located and the Dome Creek Association formed, there had never been a shovel put into the ground, and it was because it was vacant that it was taken; I was employed as attorney on the case after the ground was located, by Barnett, Ridenour, and Henry Cook; the claims were located in the name of J. C. Ridenour, in the name of Henry Cook, and those absent people who were not residents in Alaska; we used powers of attorney that Barnett had at that time, and they were included. The Circuit Court of Appeals sustained our location finally.

I represented the people. Mr. Dettering came into the litigation. I was going to settle the litigation with Mr. Miller for thirty thousand dollars, and then Dettering butted into the litigation by offering Miller thirty-five thousand dollars; he didn't own an interest in the claim; he claimed an interest, but we claimed he didn't own them. Klonos had no title. I know Klonos had no option on the ground; I can show you his deposition where he swore he never put a shovel into the ground. My people did not take the gold dust out of the ground while an injunction was pending. Mr. Dettering was not present when the settlement was made; he had been there a little while before. I took up the negotiations with Mr. Roden or Mr. Nye. It was some time ago and I do not remember all the details. The consideration paid was \$49,500.00 and I got the gold dust. Mr. Dettering never prospected the ground. I was told that there was some money spent by Harry Havery in putting down a shaft; Mr. Dettering did not put up the money for it. I represented the Fairbanks Banking Company; I was not an officer at that time; I also represented the other bank.

About September, 1909, the Fairbanks Banking Company bought the Washington-Alaska Bank for \$250,000. I do not know anything about whether the bank made any record of the disposal of this gold dust.

In RE-DIRECT EXAMINATION, by MR. KANE, the witness further testified:

There was never at any time any attempt made to cover up what was paid in settlement of this case; everybody knew what the terms of the settlement were, in a little community like that everybody knew all about it. I have no feeling of any kind against Mr. Dettering; there were no suits started by me against Mr. Dettering; he bought into the litigation; I had a chance to settle it all and he bought into it.

JOHN C. RIDENOUR, a witness on behalf of the defendant, being sworn, testified:

I am a resident of Seattle, and I formerly lived in Fairbanks, Alaska. I am the same Ridenour who with others, including Cook, located on some of this land. I remember the time the settlement was made by myself and associates and Harry Havery and his associates. The property involved in that settlement was Upper Two, No. 3, second tier, No. 4, second tier, and No. 5, second tier, and the so-called Fraction. Forty-nine thousand five hundred dollars was the total amount paid to Harry Havery and his associates in settlement of that litigation. I was quite familiar with the condition of the title to No. 5 at that time. I heard Mr. Dettering's statement when he said there was no litigation about the property; there was litigation about it; that, with other properties, were similarly affected; all that we settled was in litigation, and also there was a case pending on the third tier separate from this, with another party at that time. At that time we would not make a settlement on a part of it without settling all of it.

On CROSS EXAMINATION by MR. GRIFFIN, the witness testified:

I heard Mr. McGinn say that Manson represented our interest in buying that one-third interest of Klonos. I don't know what the agreement was; the other person interested in that No. 5 was Mr. Klonos as to the one-third interest.

(Witness excused.)

The deposition of SIDNEY STEWART, a witness for the defendant, was then read; it was as follows:

I am an accountant of Fairbanks, Alaska. I have under my control the books and records of the Washington-Alaska Bank used during the years 1909 and 1910, in which are the accounts of its depositors.

On February 21st, 1910, an account was started by Havery and Roden with this Bank; that account shows that \$36,500 was deposited to the credit of Henry Roden on February 21, 1910, and a check for \$2,750 and one for \$1,000 were charged against the account; on Feb. 24th the following checks: \$4554.50, \$4554.50, \$8,000.00, \$9342.00, \$4200.00, \$300.00 and \$1100.00, making a total of \$32,051.00 charged against the account, leaving then a balance to their credit of \$699.00, all the checks being drawn against the deposit of \$36,500.00.

No other transactions took place until March 9, 1910, when a deposit of \$3390.00 was made, and on the same day, two checks of \$233.00 each were charged to the account. On September 15, 1910, a check for \$1520.00, and one for \$420.00 were charged against the account. On September 29, 1910, a check for \$833.00 was charged against the account, which was the balance of the account then to their credit, which closed the account. Since then there has been no further transaction in the account. As to whom these payments were made it is impossible to say for the reason that the pass book has been written up and the can-

celled vouchers have been returned to Havery and Roden as indicated by the check marks on the account.

The ledger shows that William Dettering had an account with the Bank on the 21st of February, 1910; on this date \$6500.00 was deposited to his account, and on the 24th of February, 1910, \$4554.50 was deposited to Dettering's account. There were no other items deposited to his account; those two deposits are the only two deposits in his account. There was an account of William Dettering prior to February 24th, 1910, but the same had been closed on February 9th, 1910. On March 9th, 1910, there was a balance to his credit of \$9509.50, which balance remained until April 8th, 1910, when the account was charged with \$9022.50.

A. The Washington-Alaska Bank kept a record of escrow deposits which were carried by number, the details of which were expressed on the face of the envelope containing the escrow. Under number 139 of the escrow records, M. E. Manson placed seventeen thousand five hundred dollars payable to John Klonos. The maturity of that escrow was upon the determination of title. The escrow envelope is as follows: "139. Escrow. Escrow deed. The within deed of conveyance from John Klonos as grantor, to M. E. Manson, grantee, is delivered in escrow with the Washington-Alaska Bank at Fairbanks, Alaska, upon the understanding and agreement that the same shall be delivered to M. E. Manson or his agent upon the payment of the sum of seventeen thousand five hundred dollars into the said bank to the credit of said John Klonos, on or before the settlement or final determination of all suits, actions, and adverse claims against an undivided one-third interest of said John Klonos in claim No. 5 below, first tier, right limit, Dome Creek, and No. 5 below, second tier, right limit, Dome Creek, according to the terms of an optional agreement made between said parties upon this date, otherwise the same shall be returned to said John Klonos, his heirs

or assigns, to be cancelled and destroyed. Dated the first of December, 1906, signed John Klonos, M. E. Manson. February 19, 1910. Received the within document, M. E. Manson, Sam Asheim, Successors to John Klonos.

(The said deposition was duly signed, "Sidney Stewart.")

(St. pp. 143, 144, 145, 146.)

CROSS INTERROGATORIES.

A. In a book I have here in which was listed the liability of the different parties to the Washington-Alaska Bank, and under which is noted securities, etc., to these loans, if any was given at all, I find no record of eight thousand dollars made by William Dettering and Sam. Asheim. In their loan and discount register, which is a book recording all loans made by the Washington-Alaska Bank, under the date of Nov. 10, 1908, a loan No. 2505, of eight thousand dollars, was made to William Dettering and Asheim. The record shows the note was for sixty days, discounted on Nov. 12, due Jan. 9, and paid Aug. 11, no year being given. There is nothing further in this discount register showing that there was a security for this eight thousand dollar note, and I know of no other book showing loans and securities for loans other than these books just presented.

* * * * *

A. In the Collection Register of the Washington-Alaska Bank in September, 1909, note No. 917, made by William Dettering left for collection for account of J. de Journal, for nine thousand one hundred and forty-one dollars and thirty-five cents. The note was dated August 10, for three months, payable November 10, the year not being given. On January 13, 1911, a memorandum states the same was returned to Nye. There is no record in this book nor in the collateral security book of the Bank, or any other record of the

Bank that I know of or can find showing that the seventeen thousand five hundred dollars left in escrow by Manson was to secure the nine thousand dollar note or the eight thousand dollar note.

* * * * *

A. The escrow ledger shows no record of how it was disposed of, and there is no original record of the bank showing how the seventeen thousand five hundred dollars escrow money was disposed of.

(St. pp. 147, 148, 149.)

(Signed "Sidney Stewart.")

The Court then adjourned until 10 o'clock, Thursday morning, March 25th, 1915.

Leave was then granted to the defendant to file an Amended Answer, and it was stipulated between the plaintiff and defendant that the reply may be considered filed denying the Answer.

The deposition of M. E. MANSON, witness on behalf of the defendant, was then read in evidence, as follows:

My residence is Fairbanks, Alaska; my business, speculator. On the 6th day of December, 1906, I entered into an option agreement with John Klonos, under the terms of which I was to purchase the interest of John Klonos in the mining claim known as No. 5 on Dome Creek in the Fairbanks District, Alaska.

(A certified copy of that option agreement was attached to the deposition, marked "Exhibit A.")

I assigned my interest in that option to Cook and Ridenour, but I don't know the exact date of it. John Klonos assigned his interest in the option, I believe, to Sam Asheim, but the date I cannot tell you. The gold dust, amounting to \$17,500, mentioned in the option, was deposited by me in the Washington-Alaska Bank, at Fairbanks, Alaska, at various times as taken out of the ground; it was not deposited under any other conditions than those mentioned in the option agreement. I have not the original escrow agreement

delivered to the Bank in this matter or a true copy thereof. I have no knowledge of the fact that the gold dust was held as security for the payment of the promissory note of any person whomsoever. The gold dust was turned over to Henry Cook, the exact date I do not know. Klonos had assigned his interest to Sam Asheim, and Sam went with me to the bank and directed them to turn it over to Henry Cook and it was turned over to Henry Cook. I do not know anything about the suits that were pending on the 21st of February, 1910, involving the mining property from which this dust was taken. There were some suits pending, but I could not state what they were. I have no interest of any kind in the subject matter of this action. I do not know anything about whether William Dettering paid the entire consideration paid for the assignment by John Klonos to William Dettering and Sam Asheim. I cannot say as to whether Sam Asheim paid any portion of the consideration for the transfer and assignment of Klonos' interest in and to the option covering the gold dust heretofore mentioned; it is a fact that the \$17,500 in gold dust deposited by me in the Washington-Alaska Bank to the credit of John Klonos had nothing whatever to do with the mining claim and fraction known as Placer Claim No. 2 below Discovery on the right limit of Dome Creek or the Coosby Fraction adjoining said claim. The \$17,500 in gold dust deposited by me in the Washington-Alaska Bank was not in any way involved in the litigation of either of the suits brought by Harry Havery against Barnett, Ridenour, Henry Cook, McGinn, Sullivan and Peterson, and the suit brought by Harry Havery against Barnett, Ridenour, McGinn, Henry Cook, Sullivan, and Yarnell.

(St. 150, 151, 152, 153, 154.)

(This deposition was signed "M. E. Manson," and after being read was admitted in evidence without objection.)

The deposition of GEORGE P. WESCH, a witness for the defendant, was then read, as follows:

I am a prospector on Poor Man Creek, Alaska. I have known Henry Roden and William Dettering since 1906 or 1907; during the years 1909 and 1910, I held the position of cashier in the Washington-Alaska Bank, at Fairbanks, Alaska; during the months of January, February, and March, 1910, I was cashier.

On or about the 20th of February, 1910, the Washington-Alaska Bank had gold dust in its possession amounting to \$17,500 under an escrow agreement made between M. E. Manson and John Klonos, which escrow agreement specified the terms and conditions under which the gold was to be held and to whom it was to be delivered. That agreement was between M. E. Manson and John Klonos, and the gold dust was to be turned over to either Klonos or Manson; it was not to be turned over to Manson alone. Both the agreement and the gold dust were withdrawn from the Bank by M. E. Manson and Sam Asheim, as successors to Klonos. On or about the 21st of February, 1910, \$6,500 was placed in the bank to the credit of Asheim and Dettering. I cannot recall whether it was placed there by the direction of Asheim or by Asheim and Roden both. There was a tag bearing the name of Manson and Klonos on the poke of dust, but further than that there is nothing that I recall, showing the conditions under which the Bank held the same. There was nothing to indicate that this gold dust was being held as security for any indebtedness to de Journal. There was nothing to indicate that in the event this gold dust should be turned over to Asheim and Dettering or either of them that a certain promissory note for \$9141.00, dated August 10th, 1910, made by William Dettering in favor of de Journal should be paid out of the said gold dust or the money paid for it. There was nothing to show, and I had no knowledge that this gold dust was being held as security for any indebtedness of any person whomsoever. There was

nothing in the records of the Bank to show that it was held for any pledge or security.

I have known Harry Havery since 1904. On or about the 21st day of February, 1910, there was \$32,750 placed to the credit of Havery and Roden; I cannot say by whom the deposit was made. This money was checked out and disposed of as follows:

A. February 21st, 1910, check \$2750.00. February 21st, 1910, check \$1000.00. February 24th, 1910, check \$4554.50. The bank ledger shows credit to Asheim. February 24th, 1910, check \$4554.50 and bank ledger shows credit to Dettering. February 24th, 1910, check \$8000.00, bank ledger shows credit to Havery. February 24th, check \$9342.00, bank ledger shows credit to Kaskaden. February 24th, 1910, check \$4200.00. February 24th, 1910, check \$300.00. March 9th, 1910, check \$233.00. March 19th, 1910, check \$850.00. September 13th, 1910, check \$1520.00. September 13th, 1910, check \$420.00. September 29th, 1910, check \$833.00. I cannot give the names of the payees.

I know all of these transactions, being present at the time they occurred, and I refreshed my memory during July, 1914, by examining the books of the Bank. I presented the note to Roden about February 24th, 1910, for payment—the note made by William Dettering to de Journal. I do not know that any special mention was made of the account or the gold dust or anything else. Roden replied that he would have to see Dettering about it on his return from the outside. At that time I did not have any information, nor had the Bank, to my knowledge any information that anyone else was liable on that note. I presented the note to Dettering about April 1st, 1910; Dettering said that he would have to see about it, and then informed me that Asheim was liable for one-half the amount. Mr. Dettering did not at that time complain or say anything to me of the way Henry Roden had handled the affairs with the said gold dust. During the summer of 1912 he expressed himself as dissatisfied with the way af-

fairs had been handled. At the time I presented the note to Dettering he had a balance of \$1154.50 on deposit in the Bank. It was checked out by Dettering. In April, 1910, Dettering informed me that Asheim should pay one-half the note, and made no complaint about the settlement at that time. I first learned that William Dettering claimed that Asheim was liable for one-half of the note about the first of April, 1910. I am in no way interested in the outcome of this suit. I will not be in Seattle, or within a hundred miles thereof, at the time of the trial of the above entitled cause, which is set for December 18th, 1914.

CROSS INTERROGATORIES.

It is a fact that the escrow agreement between John Klonos and M. E. Manson, referred to in Interrogatory No. 6 was assigned; it is also a fact that it was assigned to Sam. Asheim and to William Dettering. I have neither the original nor a copy of said escrow agreement and assignment in my possession. The \$17,500 in gold dust in the Washington-Alaska Bank at Fairbanks was never at any time, to my knowledge, held to secure the note made by Sam. Asheim and William Dettering to the Washington-Alaska Bank. The note made by Sam Asheim and William Dettering to the Washington-Alaska Bank was taken up by de Journal; some time afterwards a note for \$9141.35 was left by de Journal for collection; the gold dust was held in escrow at all times under the original escrow agreement. The note made to the Bank was taken up by de Journal and a new note left by de Journal; and the gold dust remained in the Washington-Alaska Bank. The officers of the Bank were as follows:

E. T. Barnett, President.

L. L. James, Vice President.

G. B. Wesch, Cashier.

Each was also a director and stockholder. R. C.

Wood and W. H. Parsons were also directors and stockholders. The Fairbanks Banking Company was the principal stockholder. It practically owned all the stock, the others just held enough to qualify them as directors.

I represented David Cascaden in the settlement that was made at Fairbanks, Alaska, in the suit wherein Henry Cook and E. T. Barnett, John C. Ridenour, John L. McGinn, and M. L. Sullivan were defendants, and David Cascaden, William Dettering, J. Gianakas, Samuel Asheim, and Hilcher were plaintiffs, which suit was brought by the plaintiffs to recover from the defendants gold dust which the plaintiffs claimed had been wrongfully mined by the defendants from certain mines or certain mining claim or claims situated in the Dome Creek in the Fairbanks District, Alaska. I know of no agreement made in the office of Henry Roden and signed by David Cascaden, William Dettering, J. Gianakas, Samuel Asheim, and Hilcher in which it was agreed that the plaintiffs would not settle their claims against Cook *et al.* for gold dust mined from the claims mentioned, for less than one hundred thousand dollars, and in which it was agreed that Henry Roden was to be paid an attorney's fee of \$3,000 in said suit. I have no knowledge of the terms of any such agreement. I believe it is a fact that William Dettering paid all the money and all the consideration for the assignment of the agreement made between John Klonos and M. E. Manson, and borrowed money from the Washington-Alaska Bank to pay for such assignment.

I did say to Dettering in the Post Office at Iditarod, Alaska, about the 20th day of July, 1913: "I know all the bills and expenses were paid by you. You got used bad. Your attorneys did not protect you." While I believe all the bills and expenses were paid by him, I do not know it to be a fact. I think I did say to William Dettering aboard the S. S. Mariposa, in the presence of his wife, and to Arthur E.

Griffin in his law office in Seattle, Washington, in 1912 or 1913: "I have no knowledge of what became of the seventeen thousand five hundred dollars in gold dust or its proceeds." That was in reference to Manson and Asheim after it was delivered to them. I remember a conversation being held in the office of Mr. Griffin in the fall of 1912, but I cannot recall having made the statement that the \$175,000 in gold dust was held as security for \$8,000 made by William Dettering and Samuel Asheim, payable to the Washington-Alaska Bank, or that any card or tag was attached showing that said gold dust was held as security for any such note. I am sure I did not make such a statement or statements. I knew at that time that the last note to de Journal was signed by Dettering alone, and I did not say that I did not know. I did say that de Journal took up the first note, but I did not say that the gold dust remained to secure the note; the dust remained, but it remained pending the determination of the title. (St. 154-165.)

(This deposition was signed by "George Wesch," and the testimony therein contained was offered in evidence and admitted without objection.)

Mr. Kane then read to the jury defendant's exhibit "2," and the power of attorney made by Dettering to Henry Roden.

JOHN C. RIDENOUR, a witness on behalf of the defendant, was then recalled, and on direct examination testified as follows:

I was in Fairbanks at the time the settlement was made between Harry Havery and his associates and myself and my associates; the date of that settlement was about the middle of February, 1910. Negotiations pertaining to that settlement were taken up between the different sides along about the holidays, 1909. The different sides had meetings at which their representatives were present; I cannot tell how frequent these meetings were; the settlement was talked of about the holidays, and then there was a little over

two weeks I was out, and then from that time I stayed in town, because negotiations were pending from that time on; that is from two weeks after the holidays. I know what became of the gold dust; it was taken from the Washington-Alaska Bank and taken over to the Fairbanks Banking Company and melted up and divided. Myself and Cook and his associates got the \$17,500. It was included in the settlement and we paid those people. M. E. Manson and myself, and I believe Paul Hopkins of the Fairbanks Banking Company, received the dust and took it over to the Fairbanks Banking Company and put it in on deposit.

On CROSS EXAMINATION by MR. GRIF-FIN, the witness testified further:

Asheim was not there; Manson and myself got the gold dust; Asheim may have been in the Bank, I do not know as to that. The persons who got the dust were the same ones that Mr. Dettering had been litigating all this time with. Wesch was cashier of the Washington-Alaska Bank; I don't know whether Barnett was president of the Washington-Alaska Bank or not. Mr. Wesch would know. Asheim did not go over with us to get the gold dust.

RE-DIRECT EXAMINATION BY MR. KANE.

When I speak of the dust and what became of it when we took it out of the Bank I say that those men and myself took it to the other bank. Asheim didn't help. Barnett was somewhere in the States when the settlement was made and had been out for some time.

(St. pp. 166-169.)

ALBERT ARNDT, a witness for the defendant, being first duly sworn, testified as follows:

I live on the Yakima Indian Reservation, three miles this side of Toppenish. I lived in Fairbanks, Alaska, fourteen years; I was in Fairbanks during

1909 and 1910. I know William Dettering and Henry Roden; I also knew Sam Asheim; I knew them at Fairbanks during the years mentioned; in the winter of 1909 and the spring of 1910 I lived in the town of Fairbanks itself—in the town proper. Mr. Dettering and myself lived in a cabin; it was turned over to me by Mr. Roden. I was familiar with the litigation pending upon the Dome Creek Association claim. I lived on Dome Creek for several years and had property in the neighborhood.

I remember the time the settlement was made between Henry Havery and Barnett on the other side. During that time and previous to that time Mr. Dettering and I were living and sleeping together. I remember when Mr. Dettering came out in February; before he came out and before the settlement I talked with him about the settlement off and on; in talking with him it seemed that the law suit had been going on for years, but it seemed it came near the settlement and he expected a settlement most any time; the other parties in the law suit, Gianakas and Asheim, they all said the same—that they were going to settle the law suit, settle with the other parties. Dettering got impatient and had to go outside, and before he went outside he said he would turn everything over to Roden; if anything came up for settlement he would turn it over to Roden. We talked together about the settlement in a general way a good many times; we slept in the same bed, and the same thing, the same subject, about this settlement, used to come up a good many times; I do not know exactly how long the settlement was pending or how long Mr. Dettering was talking to me about it before he went outside, but they used to come to Roden's office at night time, and I wasn't interested in it so I went out of the office when they met there. Asheim and Charlie Shiek and Gianakas and Dettering and all of those interested in the suit on that one side met there in Roden's office. I could not say exactly how many times I saw them

meet, but I saw them quite a few times. After these meetings Dettering and I would go home; we slept together; he didn't say much about what was going on, only that they could not come to an agreement and could not settle with the Cook and Ridenour and Barnett party. Dettering told me before he left he was going to turn his business over to Roden; he was getting impatient; he had some business out here about a house and could not wait any longer and he said "Roden can settle this just as good as I can." I heard them speaking the day before he left about a power of attorney, either Dettering asked Roden about it, or Roden asked him to come in and sign it. We had been to dinner together that night.

Q. What was said about giving the power of attorney, if anything?

A. What was said about it?

Q. Why was it given?

A. To act for him in his place in case this thing came to a head.

(St. 173.)

I was in Fairbanks when the settlement was made and after. After Dettering came back from the outside he stopped in the cabin with me and we slept together; he talked to me about the settlement, after he came back—when he first came back he was awfully excited because Sam Asheim got away without paying one-half of the \$8,000 note in the Washington-Alaska Bank; and he said Asheim owed one-half of the note and ought to pay it and he could not see how the gold was removed without Asheim paying one-half out of that; he said the money for the note ought to have been taken out of the gold dust before it left the bank; the gold ought never to have left the bank. He talked to me about where the gold was gone; he said it had gone to the Cook, Ridenour party. He objected to the settlement because Roden ought to have had half of that note paid out of Sam Asheim's share. He told me that a thousand times; he was excited because

Asheim got away without paying his share of that note. I know the relations that existed between Asheim and Dettering; they were in partnership in this law suit; they got this litigation from John Klonos and they were in partnership. Mr. Dettering in his conversations with me never claimed that Asheim owed any other money except that Asheim should have paid one-half of the note at the Washington-Alaska Bank. He claimed that the note was signed by Asheim and he should pay one-half of it. He spoke to me many times about it—about being willing to pay one-half of the note himself; he always admitted he would pay one-half but would not pay all, and that Asheim should pay the other half.

On CROSS EXAMINATION by MR. GRIFFIN, the witness further testified as follows:

I guess he did think that Asheim had signed the note.

Q. You know that was his understanding and he told you many times that it was secured by the gold dust?

A. Yes, sir.

Q. That the \$9141.00 note was secured by the gold dust?

A. He always called it the eight thousand dollar note to me.

Q. The first note was eight thousand dollars?

A. I didn't know about two notes until I came in here.

Q. You know he always claimed to you even at the time he came back that that note was a secured note and the gold dust was in the Washington-Alaska Bank to secure it?

A. Yes, we talked it a good many times.

Q. And he always insisted that the gold dust was there to secure the payment of the note?

A. That is what he said. (St. p. 176.)

When I speak of Mr. Asheim being in partnership I mean they owned an interest in No. 2.

Q. Yes, each of them owned separate interest in it?

A. Not according to John Klonos. I know when Klonos first sold his interest I was intimately acquainted him him, and he was a great fellow to grab a little money from everybody. He used to go to Asheim and get money for a long time." (St. p. 177.)

According to our mining law they were partners, but not in the sense that Dettering and I would be partners if we slept in the same cabin.

Q. Asheim had a cigar stand and Mr. Dettering had business up the creek and they held their business separately?

A. In the business in the cigar?

Q. And the interest up the creek?

A. No, sir, not that way. (St. p. 177.)

I never saw an agreement in writing in which they were partners; I didn't know that Dettering paid all the money for the interest in the \$17,500.

Q. Did you ever read over the agreement that was made between the owners that they would settle this claim, authorizing Roden to settle for one hundred thousand dollars and no less?

A. I never have. (St. p. 178.)

I never heard them talk about it until I came into this court; I was not interested directly in the suit at all; I was interested on Dome Creek; my interest was close by Klonos' property. When Dettering came back to Alaska he was excited about the \$17,500 being taken away without the note being paid. He said that Asheim's share should be turned over. He did not tell me to go to the Bank to find out about the gold dust. I was out to Dettering's house in Seattle after the de Journal suit was tried and before this suit was brought. I didn't say at that time that I knew of this \$100,000 agreement whereby it was agreed among the owners that they would settle with the contestants or

claimants for less than \$100,000, because I never did know of such an agreement. I never made any such statement, because I never heard of that agreement until yesterday. I learned lots here yesterday that I didn't know.

Q. You know that the settlement referred to by Mr. Dettering when he was there in Fairbanks referred to the contentions that these people were thrashing out in court and that they were about to get their rights?

A. They were about to settle up.

Q. That all of the litigation was finally decided in their favor and that they were to have their money?

A. Yes, sir. (St. p. 179.)

On RE-DIRECT EXAMINATION by MR. KANE, the witness further testified as follows:

Q. Now Mr. Griffin asked you if you understood that the litigation had all been decided in their favor and that they were going to get their money; was that the reason or was it because they were getting together to settle?

* * * * *

A. They were getting together to settle up and make the best of the bargain. (St. p. 180.)

Q. Did Mr. Dettering ever tell you after he came back in there that he didn't know where the seventeen thousand five hundred dollars had gone?

* * * * *

Q. Did he ever tell you he didn't know where the seventeen thousand five hundred dollars had gone to?

A. No.

Q. Did he tell you where it had gone to?

A. Yes, he knew it was turned over in the settlement. (St. p. 181.)

I have heard Mr. Dettering and Mr. Asheim declare that they were mining partners. Dettering said that they, or that he and Asheim held Klonos' interest jointly.

On RE-CROSS EXAMINATION by MR. GRIFFIN the witness further testified:

Mr. Roden has not my power of attorney now; he had my power of attorney a long time ago and settled some business for me.

Q. Did Mr. Dettering ever tell you he was anxious to settle for anything he could get out of it?

A. He was anxious to get through with it.

Q. He was anxious to get his title settled and get the property?

A. The property had been worked out. (St. p. 182.)

RE-RE-DIRECT EXAMINATION by MR. KANE:

Q. Judge Griffin asked you if Mr. Roden wasn't your attorney?

A. No.

Q. As a matter of fact who is your attorney?

A. Judge Griffin is, what matters I have. (St. p. 183.)

HARRY HAVERY, a witness for the defendant, being sworn, testified as follows:

I live in San Diego, California. I lived in Alaska a little over thirteen years; I went there in December, 1897, and left there in September, 1910, for the first time. I am the same Harry Havery who brought suit for myself and for certain parties as trustee for their interests on Upper and Lower No. 2 on Dome Creek, including also the Coosby Fraction. I am acquainted with Mr. Dettering and Mr. Roden, and was also acquainted with Mr. Sam Asheim. I was the original locator on "Upper No. 2"; lower No. 2 was located by one Gilbert McIntyre; I also located the Coosby Fraction. Mr. Dettering did not locate either of the Fives. I was familiar with the title to the Fives. As to the litigation pertaining to the Fives, we were all served with papers in April, 1905, and it continued in

litigation until I settled the last settlement in February, 1910. As to Upper and Lower No. 2, the parties represented were Asheim and Dettering, Gianakas, Hilcher, David Cascaden—there was quite a few of us. I had given a half interest in No. 2 and it was divided up, and sometimes I can't think back as to who were the owners. Previous to February 17th, 1910, we had been negotiating from the previous September; there had been talk of a settlement from September continually until we settled, but it came to a focus after the Christmas holidays; that was when we all got together and agreed to take a certain sum—each one would take a certain sum for his interest in the property. We had numerous meetings in Roden's office previous to a settlement, at which Dettering, Asheim were both present as well as Gianakas, and sometimes Asheim alone and Cascaden. I can't state the number of meetings we had where Dettering was present; we were continually having meetings as one will when a thing of that kind comes up; we would make an agreement one day, to get a certain sum and then find out the next day that we couldn't get it, and the next day meet and agree upon a certain sum that each one would take, and it continued that way for several days. Mr. Dettering was not present when the actual settlement was made; he was out of the country when that was made.

In the total settlement of these claims, on the claim No. 5 we received two checks, one for \$36,500 and the remainder, \$13,000, I think it was, making up \$49,500 all told for the Twos and No. 5. The \$13,000 was checked off to Asheim and Dettering; we did not check it out, but it was checked by Asheim and Dettering—that is by Roden. We deposited for Asheim and Dettering's account that amount; the balance was checked out in the interest of the Twos and the Coosby Fraction; I have the vouchers that paid out the \$36,500. (Witness is handed several checks.) This is the check to Gianakas, accepted by him for his interest.

This is a check to J. F. Hilcher, for \$1,000 for his interest in "Upper Two." This check for \$4554 was for Sam Asheim for his interest in "Upper Two" and in the Coosby Fraction. This check to William Dettering is the same as that paid to Asheim, their interests being the same and is in payment in the damage suit in Number Two, being \$4554.50; that had nothing to do with the Fives. This check to Harry Havery for \$8,000 represented my interest—one-half of the entire amount of the damage suit; this check to Cascaden \$9342 is for his interest in the Fraction and in Upper Two and Lower Two, and this also covers expenses which Cascaden had paid out for prospecting and for costs of the suit. Mr. Cascaden paid the expenses of this suit, handling the property on Upper and Lower Two. He paid this money to me personally, all the money to carry on the work. None of this expense was paid by Mr. Dettering; all the disbursements on this property were paid by me as I had charge of the work there, and nobody but Cascaden disbursed money for this purpose; when it came to the payment of the legal fees they were paid by Cascaden and Dettering and Asheim, between them, but all the work done on the property were paid as above stated.

This check made to Henry Roden is for the Charles Schick amount; he had a lay on the property, and he had signed his interest to Roden to pay to some creditors, so Schick's amount was included in Roden's fee; Mr. Roden's share in this check was \$1100 and the balance of \$3100 was for Charles Schick.

Sam Asheim was interested in this property; he had abandoned his lay two years before, but when it came to the settlement we recognized his interest to that extent. This check to R. M. Crawford is for Hilcher and for Crawford who was Hilcher's agent; \$300.00 of this check is for Crawford. This \$1100 is attorney's fees to Mr. Nye, and this for \$1520 was paid to Tom West as de Journal's attorney's fee. This check of \$420 for Mr. Nye represents the balance

claimed for attorney's fees for himself and de Journal making the attorney's fee paid to each Nye, de Journal, and Roden \$1520.

Q. Was the sum that Mr. Dettering and Sam Asheim got as full and fair a settlement as to them, as the money that you and the others got for the proportion you had for your interests in the property?

MR. GRIFFIN: We object to that. The only way to show that is to show the interest in the claims. They haven't shown what Mr. Asheim and Mr. Dettering had in the claim at the time.

MR. KANE: I can show that if there is objection made.

THE COURT: The objection is overruled.

MR. GRIFFIN: Will your Honor allow me to show what interest Mr. Dettering had in the meantime?

THE COURT: You have already done that.

MR. GRIFFIN: You haven't permitted us to show that.

THE COURT: I permitted Mr. Dettering to testify to his interest.

MR. GRIFFIN: I offered a deed to show Mr. Dettering's interest in the property.

THE COURT: I had reference to the gold dust.

MR. GRIFFIN: Yes, as to the gold dust. But he was testifying as to the interest in the Bench Claim No. Two and not an interest in the gold dust.

THE COURT: I don't care to go into that. The objection will be sustained.

MR. KANE: We will ask an exception.

THE COURT: The exception is allowed. (St. p. 195.)

There was only one agreement which we ever signed up or agreed upon, and I never heard until yesterday of any agreement whereby we should settle for \$100,000, for if it would have been so I would have been very glad because—

THE COURT: Never mind about that. Just answer the question.

I never knew of any agreement to settle for \$100,000. There was no agreement to settle for any particular sum whatever. Finally the sum was agreed upon about one day before the settlement. Mr. Dettering never contended before me or before any meeting that he would not settle for less than \$100,000.

I am familiar with the title to the Fives; I lived there on the line of Four and Five for a year and a half with the owners.

Q. Now, when this law suit was settled, could you people have settled the damage suit and left the other out without settling them?

A. Mr. McGinn and the remainder of that party said they would not settle—

THE COURT: Answer the question; could it be done?

A. No, sir.

Q. Then, in order to settle any of those pieces of litigation, what was necessary to be done with the others?

A. They had to be all settled or none at all.

Q. Did the other people who were interested in this litigation here with you, agree to the settlement that was made on the 19th of February, 1910? (St. p. 197.)

Mr. Asheim was present when this settlement was made, and agreed to the settlement made on the gold dust.

(The witness was handed plaintiff's exhibit "D" and asked to examine the signatures.)

The signatures are all right; it contains the signatures of all the parties, either by themselves or by someone as their attorney in fact, that were interested in the litigation. It contains all of them with one exception—and that was Schick, who was interested in the lay. Sam Asheim's was made by himself. I was acquainted with Manson who held an interest in

No. 5 below under the option agreement. I knew that Cook and Ridenour claimed an interest in that property here and that was the great contention at the time on the title. If there had been any of \$100,000, or if it had ever been talked about, I would have certainly have known of it. I held the title to all these claims for those people. In receiving this cash settlement we got the best settlement we could, because at that time they had commenced another action and it looked as if the case would go on for the next five or six years; it had been going on for seven years and we got the best settlement out of the conditions that could be got.

Q. What is the fact, Mr. Havery, as to the attitude that the different representatives, such as Gianakas and the others took, in making this settlement?

MR. GRIFFIN: We object to this as incompetent, irrelevant and immaterial.

THE COURT: The objection is sustained.

MR. KANE: If the court would let me go into that, you would see the importance of it. I will ask for an exception.

THE COURT: Exception is allowed. (St. 199-200.)

(Proceedings resumed after recess.)

I have heard of the Klonos-Manson option that affected the property known as No. 5. The gold dust down there was likewise settled in the settlement of this suit.

Q. Now, was there any other option in this entire settlement or in the settlement in which you people were interested on Dome Creek, was there any option or agreement in the name of Manson affecting those properties?

* * * * *

A. No, I don't know of any other option. (St. p. 201.)

I know of no other agreement that was there in the name of Manson.

These checks which we spoke of before totaled \$49,000. \$36,500 for the damage suit, and \$13,000 for the gold dust on No. 5. The checks I testified to this morning had reference to the damage suit; that was \$36,500, less \$699.00; the explanation of that last item is:

There was a note in the bank which was against me for \$700, a note which I had endorsed for a partner of Mr. Schick, that was working on Number Two. He had borrowed this money from the bank and they had to have an endorsement, so Klonos and myself had endorsed this note, and this sum was against the amount and against Klonos and I, and on settlement they demanded payment of the note, and the note had to be paid, and I had \$8,000 coming out of the general funds.

I saw Mr. Dettering after he came into Fairbanks, it might have been a day or two after he came in in the spring. We settled in February, and I think he arrived in April. We talked over incidents pertaining to the settlement, and I told him about the settlement and asked him what he thought about it. He said he thought it was all right as far as the Twos were concerned, but he did not like the way Asheim had treated him on the gold dust; he said Asheim hadn't treated him right on that.

Q. Did he state to you anything about where the gold dust had gone, that he had knowledge of where the gold dust had gone?

A. Well, he knew that someone had taken it.

* * * * *

He said that someone had turned it over to the McGinn outfit. (St. p. 203.)

After that I was located about eight miles from Fairbanks, and was in and out of Fairbanks about once a week. I left there in September of that same year, 1910. Mr. Dettering could during all that time, and since I came out here have had full information, and could have seen the cancelled checks if he had asked me

for them; he never asked me for them; I had the checks during all that time.

Q. Another thing, around in the city of Fairbanks, state whether or not it was commonly known that this litigation was settled and how it was settled?

* * * * *

A. Fairbanks is a small district, and anything of that kind going on, everyone talks of it, and it was common knowledge that the case was settled. (St. p. 204.)

It was in the newspapers at the time it was settled. In a general way I knew of the option from Klonos to Asheim and Dettering; I knew about the relationship that existed between Sam Asheim and Dettering; I got my information as to the relationship between the parties from Asheim. It was shortly after Asheim bought the Fives from Klonos, he told me—

Q. What did Asheim tell about the partnership existing between Asheim and Dettering?

MR. GRIFFIN: We object to this as incompetent, irrelevant, and immaterial.

THE COURT: Unless the plaintiff knew about it of course. Sustained.

MR. KANE: We will ask an exception.

THE COURT: Exception is allowed.

* * * * *

A. Mr. Dettering was present at the time we were considering the negotiations with Asheim.

* * * * *

Q. Was there any relationship at that time discussed in any way?

A. We looked upon them as partners.

MR. GRIFFIN: We object to this.

THE COURT: The objection is sustained.

Q. How would you refer to each other? How would they refer one to the other in company of that kind?

MR. GRIFFIN: We object to this—

THE COURT: He may state what they said.

Q. What they said and what did to each other, as to business dealings?

A. They carried on ordinarily as partners do.

MR. GRIFFIN: We move that this be stricken.

THE COURT: Yes, it may be stricken. (St. p. 206.)

On CROSS EXAMINATION by MR. GRIFFIN, the witness further testified as follows:

Mr. Dettering did not buy his entire interest in No. 2 from Klonos. Dettering got back to Fairbanks some time in April, 1910. He said that the \$6500 which was received from the proceeds of the gold dust, and the \$4554.50 which was received as the proceeds of the damage suit, amounting to \$11,054.50, had been drawn out except \$9500 in the bank. I don't know what was in the Bank, I know what was put in.

Q. What checks have you got there to show that?

A. Here is an amount against William Dettering of \$1270 drawn out by the three parties, which was put in the bank to cover the suit which I wished to explain this morning.

Q. And this was drawn out by Mr. Roden?

A. Yes, sir.

Q. And not by Mr. Dettering?

A. No. (St. 209-210.)

The total amount which Mr. Dettering received from the gold dust and also from the settlement of the damage suit would be the amount drawn out by Mr. Roden for attorney's fees; I know that Mr. Dettering did not pay the expenses or finance that suit. I do not know what portion he paid; he might have paid some minor portion, but a very small one because I handled the money from Cascaden.

Q. Don't you know that Cascaden simply paid his portion and that the remaining portion was paid by Mr. Dettering?

A. No, Mr. Cascaden and I were together most

all the time. Cascaden informed me he put up the entire amount. (St. p. 210.)

Mr. Wesch was Cashier of the Washington-Alaska Bank. Mr. Dettering did not sign the note for \$699 that I spoke of that was taken out. Mr. Dettering was given credit in the money paid into the Bank; as to financing the suit, he did not finance that. I received \$8,000 and Cascaden received \$9342. There was an agreement made between these owners some eight months before the settlement, or possibly a year, I am not positive as to the exact time it was made; it was made between myself and all of the owners when they deeded that interest to me in trust.

RE-DIRECT EXAMINATION.

MR. KANE: What agreement was entered into? You said an agreement was entered into eight months before that.

MR. GRIFFIN: We object to that as incompetent, irrelevant and immaterial.

THE COURT: The objection is sustained.

MR. KANE: There is a contention that there was an agreement for \$100,000 settlement and I want to clear that matter up and I will be very short on it.

Q. Was there any agreement at any time as to the amount this thing should be settled for?

A. None whatever.

Q. This agreement that was made was the trustee agreement between you and the others?

A. Yes, sir. (St. pp. 212-213.)

HENRY RODEN, the defendant, called as a witness in his own behalf, being sworn, testified as follows:

I am the defendant in this case. I arrived in Alaska in February, 1908. I went in through Canadian territory; in 1910 I went into the Iditarod country and have been there practically ever since. In the early days I was miner, prospector, and day laborer. Now

I am admitted to the bar. I was admitted at Fairbanks. I have known William Dettering since the beginning of 1907. I represented him in litigation involving Upper and Lower No. Two on Dome Creek. I was his attorney in the suit that was referred to here to recover \$17,500 gold dust. Mr. Nye was the attorney of record in that suit. This map represents the Dome Group Association. I was intimately familiar in the year 1908, 1909, and 1910 with the condition of the title to those claims and particularly with reference to the title of the Fives. The final settlement of this case was made on the 19th of February, 1910. I represented Mr. Havery, Mr. Dettering, Sam Asheim, Mr. Hilcher, Gianakas, and Charlie Schick, and Cascaden; all the people who finally signed releases upon the property. Negotiations for the settlement of these claims started, practically speaking, shortly or immediately after the complaint was filed. They were negotiating for settlement, before the settlement was made February 19th, 1910, from around about the holidays 1909, and the negotiations seemed to be heading from that time.

I had many talks with Mr. Dettering previous to the settlement; some in my office and sometimes in my house where he was stopping. There were daily meetings held of all of the people or a number of the people interested in the litigation. We discussed in those meetings what propositions we should offer the other side, and how we would divide the proceeds of the litigation among the different parties.

Between the first of January, 1910, and the 19th of February, 1910, when the settlement was actually made, I would testify that there was not a day that there was not a meeting, and sometimes two and three in one day, because there was a constant intercourse between my clients on the one hand and Mr. McGinn's clients on the other hand. They were talking among themselves very often, trying to bring the thing a little

closer, while the attorneys, Mr. McGinn and myself, could never get together. (St. p. 217.)

Havery and his associates and McGinn and his associates would discuss it, especially Gianakas; he was one of my clients, and he would come two or three trips in a day or half a day and have his interview with Ridenour or some of the others, and come back and report to me; he was constantly working for a settlement because he was anxious to get out, as he did when the settlement was made; he didn't stay twenty-four hours. There were many negotiations previous to the time Mr. Dettering left, and the deal was practically closed when he did leave and he had not reached Seattle I guess, unless he made the trip in much less time than is ordinarily made, when the negotiations were closed and the settlement made. The settlement was made on the 17th and the documents were delivered on the 19th.

Referring to the conversation which Mr. Dettering and I had that lead up to the execution and delivery of the power of attorney, Mr. Dettering and myself were very close to each other; I was not only his attorney, but I was his close friend, and that is why he lived in my house. During all the trouble he had up there in the criminal case I was his chief counsel and defended him, and during those days we became very intimate. He seemed to have more confidence in me—

He told me a few days before he left. He insisted upon me taking his power of attorney which I didn't care for, but he insisted upon my taking his power of attorney so that I could represent him fully in anything that transpired, and particularly that I might have control over Mr. Nye in the lawsuit which was then pending involving the \$17,500, and that lawsuit I had declined to take, to become one of the attorneys of record, because I could see no chance at that time where they could win that suit.

Q. Was any talk had between you and Mr. Det-

tering as to how this case should be settled and his rights taken care of both as to the gold dust and the other?

MR. GRIFFIN: We object to that as suggestive and leading.

A. He told me to deposit his funds and his money, if received, to his credit in the Washington-Alaska Bank.

Q. Was there any statement made by him to you as to what his case should be settled for?

A. No, sir.

(St. p. 219.)

There was no such agreement; he placed no limitation whatever upon the amount I should settle these cases for; he told me to use my best judgment, the same as the other clients did, and do the best I could for all of them. I certainly did use my best judgment. The \$17,500 interest was sold for \$13,000. As to the condition of the title to that ground and the title to this gold dust, the title to these two Fives was in the most precarious condition of any of them. We could never have established a title because we could never prove a discovery was made on the two Fives. While we could prove a discovery had been made on the Ones, the Twos, the Threes and the Fours. Half of the \$13,000 that was received in settlement of the \$17,500 gold dust was supposed to go to the credit of Mr. Dettering and half to the credit of Sam Asheim. Asheim was present when the settlement was made, and agreed to it. The total amount received in settlement of all this litigation was \$49,500. The gold dust was turned over to Ridenour and Cook and their associates. I helped Mr. Havery on the distribution of the funds on the damages.

THE COURT: I don't care to go into the matter of the distribution of the money.

(St. p. 221.)

There was never any agreement signed by all the parties or it was never stated to me, and no one

ever informed me of any agreement not to settle for less than \$100,000. I wish there had been. Such an agreement was never discussed or talked of any time by anyone at the meetings we had. I heard of it for the first time when this law suit came up. Mr. Barnett was not in the country at the time the settlement was made, and he would not know me if he saw me. I did not represent him, and never spoke to him except since I have been in the law business. Mr. Dettering came back in the early part of April, 1910. I saw him after he came in; he came right off the stage to my office. I talked to him about the settlement of the case; I remember the incident very well; he came into my office late in the afternoon, and said to me:

“Well, Henry, I see and hear you have settled everything. Did you hold out Asheim’s half of the note,” and I said, “No, because Asheim owes no half of the note as far as I know,” and he said, “That almost ruins me,” and he said, “Asheim signed a note and he is liable on the note,” and I told him I had not inspected the note at the bank and the bank presented it for payment to me out of the Dettering account, and he insisted that Asheim had signed the note, and he and I right there and then went to the bank and asked Mr. Wesch to show us that note, and I then pointed out to him that he was the only one that had ever signed the de Journal’s note. (St. p. 223.)

He had contended up to that time that Asheim was on the note too.

Q. And what was said, or was anything said, about where the gold dust had gone to at that time?

A. I explained fully to him what had been done, and I told him what had become of the gold dust, and he realized and claimed that the gold dust had been a security for this joint note. I explained to him that the gold dust was turned over to the other side, but that even if it had been security for this note, it would not hurt him any because of him being sole-

ly liable on the note, he would be liable to pay whether out of the security or out of his other funds. (St. p. 223.)

I never refused to tell him anything up to the time this suit was commenced, or even after it. I talked to him quite a number of times after that about this settlement; I have not covered up anything, and never made an attempt to cover anything up. He was informed at the time as to what portion of the gold dust was put to his account and what portion went to Asheim's account, and his bank account showed how much was deposited. I certainly talked to him about what was done with it, and what the \$65,000 was deposited for; I told him that it was in settlement of the \$17,500. That it was his share of the \$17,500 in gold dust that was in litigation in this suit.

While Mr. Dettering was out here I did make an effort to ascertain from Mr. Dettering what, if anything, Asheim owed him. I addressed a wire to Mr. Dettering in care of Mr. Parsons here; I didn't keep a copy of the wire; that was sent in 1910. I had a talk with Mr. Dettering at that time about what was done at that time, and when he informed me upon his return that Asheim was liable for half of the note I asked him why he did not answer my wire. I had taken the matter up with Asheim to find out what, if anything, Asheim admitted he owed Dettering. Mr. Dettering never told me before he left Alaska that he himself owned this gold dust, the \$17,500, unless Asheim would pay him one-half of what he paid for it, viz: \$2,750. There was never such a conversation as that when he came back; he never made the claim that I should have kept out all the gold dust unless Asheim should pay the \$2,750. He never at any time from 1909 to the time the papers were served in this action made a demand for an accounting or statement showing how the case was settled or what was done with it. I never at any time denied him any information I had concerning the matter; it was gen-

erally known around the city of Fairbanks that this case was settled; everyone talked about it; it was in the newspapers; it is a small community. It would be the easiest thing in the world for Mr. Dettering to find out, if he wanted to, from the people in Fairbanks how this case was settled. I have examined the records and documents here; I have examined plaintiff's exhibit "D" a good many times. Fairbanks Precinct is located in the town of Fairbanks; the courthouse is there. I did not prepare plaintiff's exhibit "D" nor plaintiff's exhibit "E."

Q. I will change the question and ask you if it is a difficult thing to ascertain that that instrument is of record if a lawyer went to look for it?

A. Any person could find it and the recorder would find it for him if he could not find it himself. (St. p. 228.)

Judge Jennings and Judge Pratt are as good lawyers as any that could be found in the territory of Alaska. Plaintiff's exhibit "D" was gotten by me in November, 1913, in the city of Seattle. I dictated a statement in the office of Mr. Arthur Griffin; that statement was never presented to me up to the time it was presented here in court. I never read it over or checked it up; I have heard it read in court since. Roughly speaking the statements therein contained are correct, with this exception; perhaps I may explain that Mr. Griffin's stenographer seemed to have difficulty in understanding me, and there were quite a number of interruptions, and it may be possible that the lady left out a word or two.

A. Here it says I stated that "Mr. de Journal and his associate, Mr. Nye, also an attorney, commenced an action to enforce the specific performance of the contract referred to," that is the Klonos-Manson option, "as having been executed between Klonos and Asheim and Dettering, under which contract the \$17,500 worth of gold dust was to be delivered to the

assignees of said Klonos, that is, to Asheim and Dettering." That is all right.

* * * * *

A. Here is a statement I want to explain somewhat. "While all these suits were pending, a compromise and adjustment was made between all of the parties under which compromise, if I remember correctly, Barnett and his associates paid \$62,500.

* * * * *

A. Some short time ago I made a trip to Fairbanks to look at the bank records to refresh my memory, and I know positively every cent was turned into the bank, and the bank records show that we turned in \$49,500, so I say as I corrected myself here, I say, "If I remember correctly, Barnett and his associates paid \$6,500." (St. pp. 229-230.)

We held out for \$62,500 for four weeks, and that is the amount we tried to get; we figured all those checks and that makes \$36,500.

Q. Just glance through that exhibit and see what other corrections you want to make. * * * What changes you want to make from what is not correct to the correct statements?

A. Here, this is absolutely wrong: "It was agreed by all the parties in interest that the \$17,500 was to be for Mr. Dettering and Mr. Asheim. It was agreed that the \$17,500 should be deducted from the \$62,500 and the remainder divided in accordance with the different interests held by the different parties." Now, I never stated that the \$17,500 should be deducted from the total. I did not state that the settlement for the \$17,500 should be subtracted from the total, because I always knew that we never received the full amount because the other party would gain nothing. If they paid us the full amount, it would not be a settlement. (St. pp. 230-231.)

I made the statement, which is plaintiff's exhibit "B," about two years ago now, at Juneau, when I was a member of the Alaska Legislature, and Mr.

Dettering came up to secure some information, and on the whole the statement is correct.

CROSS-EXAMINATION by MR. GRIFFIN:

Yes, I was in error in regard to the \$62,500 statement, and I correct it. In view of the testimony that Wesch gives here, I say now that there was no slip attached to the gold dust in the Washington-Alaska Bank saying that the dust was being held as security for the \$8,000 note. I am not certain when that \$8,000 note was given, I don't know anything about it. I did state in that statement that the \$17,500 in gold dust was being held as security for the \$8,000 note and that was not true; I said that because Mr. Dettering told me that and I believed him. I did not have full knowledge of Mr. Dettering's affairs up there concerning the \$8,000 note. When the power of attorney was given full power over everything that transpired from the time the power of attorney was given, and I was given preference in the matter of the gold dust over Mr. Nye. I did not see that the note was paid out of the gold dust because there was nothing to show that the gold dust was being held as security for the de Journal note. I did not know that such a note was in existence when this money was turned over. I did not know of the \$8,000 note until Mr. Dettering came back and told me about it. I said in my statement that the \$17,500 was held as security because you asked me to give a statement as near as I knew of the circumstances, and I gave you a statement as I learned it from Mr. Dettering and his side, and the other side, and gave you a statement. That was after the contention was disposed of.

Q. And you say there in this statement, "Meanwhile the promissory note executed by Asheim and Dettering was purchased by Mrs. de Journal and the new note was executed by Asheim and Dettering in favor of J. de Journal, the wife of Mr. F. de Journal,

after the modification of the decree in the Circuit Court of Appeals." You knew all about that?

A. I learned that subsequently. (St. p. 234.)

When Mr. Dettering went out he put me in charge of the business; it is true that he left the account of \$9,000 and did not tell me about it. There were many things that he did not tell me, I dare say. He put his law business in my hands—his legal transactions. I have represented him in all of these law suits up to that time; I did not represent him as attorney in the suit for the recovery of the \$17,500 in gold dust; I was acting for Mr. Nye in Mr. de Journal's stead. I represented him in the suit for \$17,500 and I signed for the \$13,000 in cash and I paid over one-half of it to Sam Asheim, knowing that he was entitled to it. Mr. Dettering did not pay the entire consideration for the \$8,000 note. I don't know what he did with the \$8,000. I did not know that he borrowed it from the New York Life Insurance Company. When Mr. Dettering returned he told me that he had signed a note for \$8,000. I wish that he had told me before, and I could easily have kept Asheim's interest out of it. I was looking after his interests there. I ordered Asheim's share to be turned over to Asheim. I had previously wired Dettering to know what amount Dettering was owing Asheim, and I waited a reasonable time to hear from Mr. Dettering before paying over Asheim's share of the money; I waited a reasonable time—but not until I heard from him. I did not wait for his answer because I took it for granted that he had the telegram and he didn't require anything further and that there was nothing to answer.

Q. Did you send a tracer to find out whether the telegram had been received by him?

A. The United States Signal Corps inform you when you send a message, if it is not delivered, they send a message back or wire, "your wire of so and so not delivered."

I found that this message was delivered as I

presumed; I didn't know whether it was delivered or not. The fact that I got no return proves that it was delivered. I had full authorization to turn over the \$6,500 to Mr. Asheim; I got that authority from Mr. Dettering when he left on the 19th of February, 1910; he told me that Asheim was the owner of one-half of the gold dust; he did not tell me that Asheim owed one-half of the note, and I didn't know that he did. His failure to tell me was probably an unfortunate oversight on his part. Dettering did not furnish a dollar to finance those suits except one-third of the attorney's fees, amounting to \$500. I do not know what the \$8,000 was borrowed for. Nobody knew that Mr. Manson represented their interest when they bought of Klonos a one-third interest in the No. 5. I learned it when they made the settlement.

Q. That Klonos, the owner, and Manson, the other party in interest having agreed upon that transfer, that left nothing against the \$17,500, did it?

A. It left Cook, Ridenour, Barnett, McGinn and Sullivan. (St. p. 238.)

There could not be anything more substantial against the \$17,500 than there was; there was an absolute claim of other people. If there was one claim not trumped up it was certainly the Fives. It was all bona fide litigation and the Circuit Court of Appeals sustained it, and their location is sustained.

Q. You said to me that the note was probably secured from Mr. Dettering with the understanding that Asheim should sign it, didn't you?

A. I believed that, yes, sir.

Q. You believed that then?

A. I believe it now. I believe that that \$9,000 note ought to have been signed by Asheim.

* * * * *

A. I never believed anything else, and I believe it was an unfortunate oversight on the part of Mr. Dettering and on the part of de Journal not to get Asheim to sign the note, because it would have then

been an easy matter to have it paid at the time of the settlement. (St. p. 241.)

I came to that conclusion when I learned about the note, and I learned for the first time, and I believe now that Dettering lost one-half of that note and I believe that Asheim ought to have paid it. If I had had the faintest idea that Asheim owed half of the note, I would have been too gold to hold it. I did not keep the money because there was no reason for my thinking that he owed it. I telegraphed to Dettering because they were partners and they had little business transactions together. I know that they were partners; the same day that Mr. Dettering bought in No. 2 he gave a deed to Asheim for his half of his interest. I have no copy of that deed, but I have papers to prove it. It is signed by Mr. Dettering. I said that the gold dust was paid over to McGinn and he paid the money to Havery and myself. Asheim's one-half was paid to Asheim with Nye's consent. I did not make the statement shown on the instrument in hand writing where it says that Dettering, Asheim, Cascaden, Schick and Havery were interested in securing the \$62,500 paid by Cook, Barnett and others; that is in your handwriting. (Griffin's.)

Mr. Dettering did not leave any of his papers with me. I did not wire Dettering before making the settlement because I had full control and he knew the amount we were going to receive and it was not necessary to get an authorization to settle because that was what he gave me the power of attorney for. He got a good, fair consideration, it was as good as I could get.

I kept no account whatever between Dettering and myself except \$500 attorney's fees. A portion of the \$6,500 and the \$4,554.50 was drawn out before Dettering got there; there was drawn out on the 21st of February, \$2,750, and on March 9th, \$1,270; \$9,500 was the total amount received in the damage suit by Mr. Dettering. I made the settlement for him and there were several others interested in it; I knew

what interest Asheim had in it; I did not know that Asheim ought to pay the note. I wish I had known it. Dettering and Asheim were partners; I did not wait until the other partner came in before authorizing Havery to pay the other partner because I represented the other partner—because I represented Mr. Dettering and he had directed me to do so.

On RE-DIRECT EXAMINATION, by MR. KANE, the witness further testified:

There never was any question at any time as to Mr. Asheim having a half interest in the gold dust. Mr. Dettering knew something about what the settlement would be before he left for the outside; I am quite sure that he did not know it would be \$49,500, because we were holding out for \$62,500; the sum had been discussed; now, I would not have consented to the settlement if I had not been driven into it by my own clients, and Gianakas coming to me and saying he was going to settle if we didn't all go together. When we came together all of my clients and all the people represented by Havery came down proportionately in the amount that they would take.

On RE-RE-DIRECT EXAMINATION, by MR. KANE, the witness testified as follows:

A. There is one thing that caused me to make a settlement in the gold dust, the \$17,500, for \$13,000 in cash; this gold dust had come out of Number Five Claim; it was in litigation, and the attorney for the clients was a gentleman by the name of Coosby, and he had died and here they were standing in court and no attorney, and I appeared for them when the proceedings were had, and it would have required the employment of attorneys, both in the lower court, and undoubtedly whichever side lost would have appealed the case, and it would have again required the employment of attorneys in the higher court, and I

thought, with the expenses of new counsel, and going to the expense of the litigation, that if we could receive \$13,000 cash for the \$17,500 gold dust, and settle it, that we were making an excellent settlement. That is all.

On RE-RE-CROSS EXAMINATION, by MR. GRIFFIN, the same witness testified as follows:

The \$17,500 had no connection with the damage suit, except in this—that the other side refused to settle anything unless all was wiped out.

MR. KANE: With the exception of introducing these two documents, which are certified copies of the suit of Havery vs. Yarnell and Peterson, we will rest. The only purpose I have in introducing them is to show that they were instruments of record.

THE COURT: Well, that is already in the testimony.

MR. KANE: Then I rest. (St. p. 251.)

WILLIAM DETTERING, being called in RE-BUTTAL, testified as follows:

I never told Mr. Arndt or Mr. Havery that Sam Asheim was a partner of mine. I was present when Mr. Arndt was out at my home and he told me in the presence of Mrs. Dettering, in our home, that Mr. Roden had settled this suit contrary to the agreement signed by the owners to the effect that the suit should not be settled for less than \$100,000.

VERONA W. DETTERING, called as a witness of the plaintiff, in REBUTTAL, testified as follows:

I have been married to Mr. Dettering since May 22, 1913. In 1910 I was in Washington with Senator Piles; I was one of his Secretaries. I have known Mr. Dettering for about twelve years. Mr. Arndt was out to our house twice somewhere between the holidays and the time we started suit against Mr. Roden; that was March 12th.

Q. Well, Mr. Arndt, while he was there, did he

state to Mr. Dettering in your presence that the defendant in this case had settled the damage suit in Alaska against the directions of the owners and in violation of an agreement that they had signed that the suit should not be settled for less than \$100,000?

A. Yes, he said they made a very bad settlement—

MR. KANE: Wait a moment. I object to this as incompetent, irrelevant and immaterial.

* * * * *

THE COURT: Oh, let it stand. (St. p. 256.)

* * * * *

Q. Did he or did he not at that time say to Mr. Dettering in your presence that the defendant had settled the damage suit against the directions of the owners and against their agreement that it should not be settled for less than a hundred thousand dollars?

MR. KANE: We object to that as incompetent, irrelevant and immaterial.

THE COURT: She may answer.

MR. KANE: We will ask an exception.

THE COURT: Exception is allowed. (Witness excused.)

A. He did. (St. p. 257.)

MR. KANE: We rest, your Honor. I forgot to introduce that map and I want that introduced in the record.

MR. GRIFFIN: We have no objection.

THE COURT: It will be admitted. (St. p. 259.)
(The jury was then excused for a few minutes.)

MR. KANE: At this time, Henry Roden, the defendant in this action, first challenges the sufficiency of the evidence of the plaintiff to make out a case sufficient to go to the jury and asks for an order directing the jury to return a verdict for the defendant, and at this time the defendant Henry Roden, challenges the sufficiency of the evidence and, considering all the evidence that is now in, moves the court for an order directing the jury to return a verdict for the defendant upon the ground that the complaint fails to state

facts sufficient to constitute a cause of action against the defendant, and upon the further ground that there is a fatal variance between the pleadings and the proof in this case, and upon the ground that it appears from the complaint and the evidence of the plaintiff, and from all the evidence introduced in the trial, that the plaintiff has been guilty of laches and that the action has not been brought within the time allowed by law, and that it is barred by the statute of limitations, and upon the further ground that the uncontradicted evidence in the case now shows that the defendant Henry Roden has not violated any trust and has not done anything that is alleged as a wrong doing in the complaint which would constitute a cause of action by the plaintiff against him. That he has fully and fairly accounted for his acts which he did under a power of attorney executed by the plaintiff to the defendant, and that if there was any loss on the part of the plaintiff that it was an error of judgment on Mr. Roden's part and not any mistake or act for which he could be held accountable.

Now, if the Court please, turning to the complaint, we find this in paragraph four, and this covers practically the whole complaint. (Quoting from the Complaint.)

(Argument.)

THE COURT: I think I will submit it to the jury. It is always better to have the jury pass upon it if there is any question of fact at all.

(Exception requested and allowed.)

WHEREUPON, in furtherance of justice and that right may be done, the defendant presents the foregoing as his Bill of Exceptions, and prays that the same be allowed, settled, signed, and certified as provided by law.

Dated this 26th day of May, A. D. 1915.

HENRY RODEN, Defendant.

By FARRELL, KANE & STRATTON,

His Attorneys.

The matter of the settling and certifying of the foregoing Bill of Exceptions came on regularly to be heard this 12th day of June, 1915, both parties being represented by counsel present.

It appearing to the Court that on the 2nd day of April, 1915, this Court did make and enter an order extending the May term of this court up to and including this date for the purpose of serving, filing, certifying and settling the Bill of Exceptions in the above entitled action; it further appearing that the defendant has within the time prescribed by law and the rules and orders of this Court served and lodged with the plaintiff and with the Clerk his proposed Bill of Exceptions; that the plaintiff has announced to the Court that he has no amendments or objections to the bill proposed by the defendant. The Court having examined the defendant's proposed Bill of Exceptions, and being satisfied that the same and the proceedings connected therewith are correct and in conformity with the law, and that said proposed Bill of Exceptions together with plaintiff's exhibits A, B, C, D, E, and defendant's exhibits 1, 2, 3, to be and to comprise all of the testimony, facts, evidence and proceedings had or given at the trial herein.

Now, therefore, it is by the undersigned Judge of the above entitled court, who presided at the trial and over the proceedings of the above entitled action, ordered and certified that the foregoing which is the defendant's proposed Bill of Exceptions, be and the same is hereby signed, settled, and certified as the true Bill of Exceptions, and that the same together with plaintiff's exhibits A, B, C, D, E, and defendant's exhibits 1, 2, 3, includes and composes all of the facts, exhibits, evidence, testimony and proceedings introduced, heard or had at the trial of this action; that each and all of the exceptions here noted were taken at the trial of said cause, and the proposed Bill of Exceptions is correct and complete in all respects, and is hereby allowed, certified, settled, signed and made a part of

the record herein, and the same being settled, certified and signed is hereby ordered to be filed by the Clerk.

Signed: JEREMIAH NETERER, Judge.

Indorsed: Defendant's Proposed Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 12, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

MOTION.

Comes now the above named defendant and moves the Court for an Order extending the time in which the defendant shall be required to file his Bill of Exceptions herein, and granting to the defendant an extension of time up to and including thirty (30) days after the ruling of the Court upon the defendant's motion for a new trial.

Dated this 1st day of April, 1915.

FARRELL, KANE & STRATTON,
Attorneys for Defendant.

Indorsed: Motion. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 2, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

ORDER EXTENDING TIME FOR FILING BILL OF EXCEPTIONS.

This matter coming on regularly upon the motion of the above named defendant, after due notice to the plaintiff, for an order extending the time in which to file a Bill of Exceptions herein, and the Court being fully advised in the facts, the law, and the premises;

Now, therefore, it is hereby ordered, adjudged and decreed that the time for filing or serving the proposed Bill of Exceptions on behalf of the defendant in the above entitled action is hereby extended up to and including thirty (30) days after the ruling of this

Court upon the defendant's Motion for a New Trial in the above entitled action, and for such purpose this term of Court is extended beyond the end of the present term.

Done in open Court this 2d day of April, 1915.

JEREMIAH NETERER, Judge.

Indorsed: Order Extending Time for Filing Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 2, 1915, Frank L. Crosby Clerk. By E. M. L., Deputy.

OPINION ON MOTION FOR NEW TRIAL.

ON MOTION FOR NEW TRIAL.

MOTION DENIED.

Griffin & Griffin, for Plaintiff.

Farrell, Kane & Stratton, for Defendant.

NETERER, District Judge.

I think the motion for new trial in this case should be denied. The matter was fully and fairly presented to the jury under the instructions of the Court, and I think there is evidence, if believed by the jury, upon which the verdict could be predicated. It isn't for me to weigh the evidence, and in view of the fact that there is some evidence, and it having been submitted to the jury and the jury having weighed the evidence and concluded with relation to it, I think that should be conclusive upon the Court.

The motion for new trial will therefore be denied.

JEREMIAH NETERER, Judge.

Indorsed: Opinion on Motion for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 27, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

JUDGMENT.

This cause came duly and regularly on for trial before Honorable Jeremiah Neterer, one of the Judges

of the above entitled Court; the plaintiff appeared in person and by Griffin & Griffin, his attorneys; the defendant appeared in person and by Messrs. Farrell, Kane & Stratton, his attorneys; a jury was duly and regularly impaneled to try the cause, after which evidence was duly and regularly introduced by and upon behalf of the plaintiff and by and upon behalf of the defendant; arguments were made for the respective parties by their counsel, and the jury was thereafter given instructions applicable to said cause by the Court and retired in charge of sworn officers to consider their verdict; thereafter said jury returned in open Court, the attorneys for plaintiff and defendant being present, and returned their verdict, in favor of the plaintiff and against the defendant, for the full sum of \$6,500, and said jury was thereupon polled at the request of the attorneys for the defendant and all twelve of the jury when their names were called made answer that said verdict returned was their verdict and the verdict of the jury.

Thereafter a petition for new trial was served and filed by the attorneys for defendant and said petition was brought on for hearing and argued by the respective parties and was thereupon taken under advisement by the Court, after which the Honorable Jeremiah Netterer filed his written opinion denying the defendant's petition for a new trial; to which order of ruling of the Court the defendant by his attorneys excepted and his exceptions were allowed by the Court. Whereupon the attorneys for plaintiff moved for judgment upon said verdict, and the Court being now fully advised grants said motion.

It is therefore ordered, adjudged and decreed by the Court that the plaintiff, William Dettering, do have and recover of and from the defendant, Henry Roden, the full sum of \$6,500, together with interest on said amount at the legal rate from this date and together with his costs and disbursements herein to be taxed by the Clerk and that execution issued therefor.

To the rendering and entering of said judgment the defendant, by his counsel, excepts and his exceptions are allowed by the Court.

Done in open Court this 29th day of April, A. D. 1915.

JEREMIAH NETERER, Judge.

Indorsed: Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 29, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

PETITION FOR ORDER ALLOWING WRIT OF ERROR.

To the HONORABLE JEREMIAH NETERER,
Judge of the District Court aforesaid:

Now comes HENRY RODEN, defendant in the above entitled action, by his attorneys, and respectfully shows that on the 26th day of March, 1915, a jury duly empaneled in the above entitled Court found a verdict against the said Henry Roden and in favor of William Dettering, the plaintiff herein, in the sum of \$6,500.00, and upon said verdict a final judgment was entered on the 29th day of April, 1915, in the sum of \$6,500.00, together with interest thereon from the 29th day of April, 1915, and for the plaintiff's costs and disbursements against the said defendant Henry Roden.

Your petitioner, Henry Roden, feeling himself aggrieved by said verdict and judgment entered thereon, in which judgment and verdict and the proceedings leading up to the same certain errors were committed to the prejudice of the said defendant, which more fully appear from the assignment of errors which is filed herewith, comes now and prays said Court for an Order allowing the said defendant to prosecute a Writ of Error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, under and according to the laws of the United States in that behalf made and pro-

vided; and that a Writ of Error do issue that an appeal in this behalf to said United States Circuit Court of Appeals aforesaid sitting at San Francisco, California, in said Circuit, for the correction of the errors complained of and assigned, be allowed; and also prays that an order be made fixing the amount of security and cost bond, which the defendant shall give upon said Writ of Error; and the defendant further prays that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit of Appeals, and your petitioner will ever pray.

Dated this 27th day of October, 1915.

FARRELL, KANE & STRATTON,
Attorneys for Defendant.

Copy of within petition received and due service of same acknowledged this 27th day of October, 1915.

GRIFFIN & GRIFFIN,
Attorney for Plaintiff.

Indorsed: Petition for Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 27, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL.

Comes now HENRY RODEN, defendant and plaintiff in error in the above entitled and numbered cause, and in connection with his Petition for a Writ of Error in this cause assigns the following errors which plaintiff in error avers occurred in the trial thereof, and upon which he relies to reverse the judgment entered herein as appears of record.

I.

The Court erred in considering the cause or any part thereof, and in entering judgment therein, because it affirmatively appeared from the files and proceedings that the defendant was at the commencement of the

action and at all the times mentioned in the Complaint, a resident and citizen of the Territory of Alaska, and remained such at all times after the commencement of the action and the filing of judgment herein, and that the plaintiff was at all of said time a resident and citizen of the State of Washington. That because of said facts the cause was not removable to the United States District Court for the Western District of Washington, Northern Division, and the said Court had no jurisdiction of the persons or the subject matter hereof.

II.

The Court erred in denying the challenge as to the sufficiency of the evidence and motion to dismiss and for an instructed verdict made at the close of all the evidence by the defendant Henry Roden, which motion and challenge is as follows:

MR. KANE: At this time, Henry Roden, the defendant in this action, first challenges the sufficiency of the evidence of the plaintiff to make out a case sufficient to go to the jury and asks for an order directing the jury to return a verdict for the defendant, and at this time the defendant Henry Roden challenges the sufficiency of the evidence and, considering all the evidence that is now in, moves the Court for an order directing the jury to return a verdict for the defendant upon the ground that the complaint fails to state facts sufficient to constitute a cause of action against the defendant, and upon the further ground that there is a fatal variance between the pleadings and the proof in this case, and upon the ground that it appears from the complaint and the evidence of the plaintiff, and from all the evidence introduced in the trial, that the plaintiff has been guilty of laches and that the action has not been brought within the time allowed by law, and that it is barred by the statute of limitations, and upon the further ground that the uncontradicted evidence in the case shows that the defendant Henry Roden has not violated any trust and has not done anything that is alleged as a wrong doing in the complaint which would

constitute a cause of action by the plaintiff against him. That he has fully and fairly accounted for his acts which he did under a power of attorney executed by the plaintiff to the defendant, and that if there was any loss on the part of the plaintiff that it was an error of judgment on Mr. Roden's part and not any mistake or act for which he could be held accountable.

Now, if the Court please, turning to the complaint, we find this in paragraph four, and this covers practically the whole complaint. (Quoting from the Complaint.)

(Argument.)

THE COURT: I think I will submit it to the jury. It is always better to have the jury pass upon it if there is any question of fact at all.

(Exception requested and allowed.)

(a) Because it affirmatively appears upon the record and pleadings and from all the proceedings that the Court had no jurisdiction of the parties or of the subject matter of the action, because the cause was between a citizen of the Territory of Alaska and the State of Washington, and was not removable to the United States District Court for the Western District of Washington.

(b) Because it affirmatively appears from the record and all of the evidence and proceedings that the action or any part thereof was not commenced within the time limited by law, and that both causes of action of the same and the whole thereof were barred by the statute of limitation of the Territory of Alaska.

(c) Because it affirmatively appears that if the plaintiff ever did have a cause of action against the defendant, the same and the whole thereof is barred by the laches of the plaintiff.

(d) Because there was insufficient evidence to prove the allegations of the plaintiff's first cause of action set forth in the plaintiff's Complaint, and because the evidence affirmatively shows that said allegations are untrue.

(e) Because there was insufficient evidence to prove the allegations of the plaintiff's second cause of action set forth in the plaintiff's Complaint, and because the evidence affirmatively shows that the said allegations are all untrue.

(f) Because the evidence fails to prove:

First—That the defendant conspiring with the defendants in said suit to wrong, cheat, and defraud the plaintiff, did unlawfully, wrongfully, and without authority and without the knowledge or consent of the plaintiff, take, assign away, and dispose of the said seventeen thousand five hundred dollars worth of gold dust then and theretofore on deposit in the said Washington-Alaska Bank; and

Second—And did wrongfully detain and fail to pay over to the plaintiff or to account to the plaintiff for said gold dust or any part or portion thereof or any part of the proceeds thereof; and

Third—And has at all times since the said 17th day of February wrongfully and untruthfully stated to and informed the plaintiff that he, the defendant, did not take, assign away or dispose of said gold dust and that he, the defendant, had nothing whatever to do with the taking, assigning away or disposing of said gold dust, and had no knowledge of what disposition was made of the same or any part or portion thereof; and

Fourth—And defendant has at all times detained and wrongfully failed to pay or to account for the proceeds of said gold dust so taken and disposed of or any part thereof.

Fifth—That the plaintiff did not become familiar with the assignment made by the defendant or with the transactions of the defendant on his behalf and under the power of attorney until December 20th, 1913, as alleged in plaintiff's Complaint, but on the other hand affirmatively shows that said allegations were not true and especially that the plaintiff was familiar with all of the defendant's transactions on his behalf and under

said power of attorney, a short time after said transactions had taken place, and sanctioned the same.

(g) Because it affirmatively appears from the evidence that:

First—"The defendant wrongfully, unlawfully and fraudulently informed and told the plaintiff that he, the defendant, had not signed away any right of the plaintiff to said gold dust; that he had nothing whatever to do with the taking, assigning away, or disposal of said gold dust; that he, the defendant, did not know who had taken the gold; that if the gold dust had been removed or taken from the bank it had been done without his (defendant's) knowledge or consent," as alleged in plaintiff's Complaint, but on the contrary, that said defendant fully apprised said plaintiff of all of his actions and especially of said assignment and doings under the power of attorney given by the plaintiff to the defendant.

Second—That the plaintiff was not deceived or misled to his damage by any statements of the defendant.

III.

Because there is a fatal variance between the allegations of the plaintiff's Complaint and the facts shown by the evidence.

WHEREFORE, The defendant and plaintiff in error prays that the judgment of said Court be reversed and that the District Court be directed to dismiss said case as prayed in the Answers therein, and for such other and further relief as to this Court may seem just and proper.

FARRELL, KANE & STRATTON,
Attorneys for Defendant and
Plaintiff in Error.

Filed this 27th day of October, 1915.

FRANK L. CROSBY, Clerk.

ED M. LAKIN, Deputy.

Clerk of the United States District Court for the Western District of Washington, Northern Division.

I hereby acknowledge due and correct service of the foregoing Assignment of Errors this 27th day of October, 1915.

GRIFFIN & GRIFFIN,

Attorney for Plaintiff.

Indorsed: Assignment of Errors and Prayer for Reversal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 27, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

ORDER GRANTING WRIT OF ERROR AND FIXING AMOUNT OF BOND.

This matter came on regularly to be heard this day in open court, upon the Petition of the defendant, Henry Roden. It appearing to the Court that said Petition prays the allowance of a Writ of Error in the above entitled action, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and further prays that a transcript of the record and proceedings and papers upon which judgment was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and the amount of the Cost Bond be fixed by the Court, and that such other and further proceedings may be had as may be proper in the premises; it further appearing that the defendant Henry Roden has heretofore served upon the plaintiff and filed and presented to this Court his Assignment of Errors, and prayer for reversal, and has taken all steps necessary to entitle him to a Writ of Error,

NOW, THEREFORE, This Court, having duly considered said Petition and said Assignment of Errors, and prayer for reversal, DOES HEREBY ALLOW SAID WRIT OF ERROR and grants the relief prayed for in said Petition, and IT IS NOW ORDERED that the Bond of the defendant on said Writ of Error be and the same is hereby fixed at \$250.00.

JEREMIAH NETERER, Judge.

Indorsed: Order Granting Writ of Error and Fixing Amount of Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 27, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

COST BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, That we, HENRY RODEN, defendant in the above entitled action, as principal, and The Aetna Accident and Liability Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and authorized to do business in the State of Washington, as Surety, are held and firmly bound unto William Dettering, plaintiff in the above entitled action, in the sum of \$250.00, to be paid to said plaintiff William Dettering, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, administrators, successors or assigns jointly and severally by these presents.

Sealed with our seals and dated this 27th day of October, 1915.

THE CONDITION OF THE ABOVE OBLIGATION is such that WHEREAS, in the above Court and cause final judgment was rendered against the defendant Henry Roden and in favor of the plaintiff William Dettering in the sum of \$6,500.00, with interest thereon at legal rate from April 29, 1915, and for his costs and disbursements incurred and expended, amounting to \$57.45; and

WHEREAS, The said defendant has obtained from the said Court a Writ of Error and filed a copy thereof in the Clerk's office of said Court to reverse the judgment of said Court in said action, and a Citation, directed to the said William Dettering, plaintiff, is about to be issued citing him to appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden in San Francisco, in the State of California.

NOW, THEREFORE, If the said defendant, Henry Roden, shall prosecute the said Writ of Error to effect and shall answer and pay all costs if he fail to make good his plea, then the above obligation shall be void, otherwise to remain in full force and effect.

HENRY RODEN, Principal.

By J. H. KANE,

His Attorney in Fact.

And by FARRELL, KANE & STRATTON,
His Attorneys.

THE AETNA ACCIDENT AND LIABILITY COMPANY
By GEORGE W. ROURKE,
Its Resident Vice President.

Attest:

CHAS. M. DIAL, (Seal.)
Its Resident Assistant Secretary.

The above and foregoing bond, and the sufficiency of the Surety thereon is hereby approved by me this 27th day of October, 1915.

JEREMIAH NETERER,
Judge of the District Court of
the United States for the Western
District of Washington.

Indorsed: Cost Bond on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Oct. 27, 1915. Frank L. Crosby. By Ed M. Lakin, Deputy.

ORDER IN RE EXHIBITS.

It appearing to the Court that the parties hereto have stipulated that Plaintiff's Exhibits A, B, C, D and E. and Defendant's Exhibits 1, 2 and 3 need not be printed and that the originals of the same may be sent to the Circuit Court of Appeals; and

It further appearing that it is just and proper that the original Exhibits should go to the Circuit Court of Appeals and that the same need not be printed;

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED That Plaintiff's Exhibits A, B, C, D and E and Defendant's Exhibits 1, 2 and 3 in the above entitled action need not be printed and that the originals of the same may be sent to the Circuit Court of Appeals by the Clerk of this Court.

Done in open Court this 19th day of November, 1915.

JEREMIAH NETERER, Judge.

Indorsed: Order in re Exhibits. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 19, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the
Western District of Washington.
Northern Division.

WILLIAM DETTERING, Plaintiff,

vs.

HENRY RODEN, Defendant.

No. 2726

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO ORIGINAL EXHIBITS.

United States of America, Western District of Wash-
ington—ss.

I, Frank L. Crosby, Clerk of the District Court
of the United States for the Western District of

Washington, do hereby certify that the hereto attached sealed package contains the original exhibits introduced and used upon the hearing and trial of the above entitled cause, as follows: Plaintiff's Exhibits A, B, C, D and E, and Defendant's Exhibits 1, 2 and 3; which said original Exhibits are herewith transmitted to the Circuit Court of Appeals, there to be inspected and considered together with the transcript of the record on appeal in the above entitled cause, which said exhibits are so transmitted pursuant to the order of the said District Court so directing, a copy of which said order will be found on page 139 of the record on appeal in said above entitled cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, at Seattle, in said District, this 13th day of December, 1915.

FRANK L. CROSBY,
Clerk U. S. District Court.

NOTICE TO PRODUCE.

To the above named defendant, and to Messrs. Farrell, Kane and Stratton, attorneys for the defendant:

You and each of you are hereby notified and will please take notice hereby that the plaintiff requires you to produce at the trial of said cause the following instruments in writing now in the possession of the defendant, to-wit:

First: That certain statement, writing or declaration made and signed by Sam Asheim at Fairbanks, Alaska, on or about the.....day of....., A. D. 1910, in which said Asheim admitted in writing that the plaintiff in this action, William Dettering, was a party in interest in that certain suit brought in the name of said Sam Asheim to recover the possession of seventeen thousand five hundred dollars in gold dust then on deposit in the Washington-Alaska Bank of Fairbanks, Alaska, and in which said Asheim acknowledged said suit was brought on behalf of himself and

said William Dettering, which said statement, writing and declaration was delivered to the defendant, Henry Roden, by the plaintiff, William Dettering, shortly before the time the plaintiff left Fairbanks, Alaska, to come to Seattle in the winter of A. D. 1910.

Second: That certain writing signed by Harry Hovary, Sam Asheim, James Cianekas, William Dettering and ——— Hilcher by which the defendant, Henry Roden, was authorized to settle the suit then pending brought in the interest of the persons in this paragraph above named against Henry Cook et al., to recover damages for gold dust which the defendants in said suit had wrongfully mined from mining properties, and by which writing the defendant, Henry Roden, was authorized to settle said suit for the sum of One hundred thousand dollars and for no sum less than said amount, and which writing was made in the fall or early winter of the year A. D. 1910, and was delivered to and left with the defendant Henry Roden.

ARTHUR E. GRIFFIN,
Attorney for Plaintiff.

Indorsed: Notice to Produce. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 23, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

NOTICE.

To the above named defendant and to Messrs. Farrell, Kane & Stratton, his attorneys:

You and each of you are hereby notified and will please take notice hereby: That an error was made by the plaintiff in answering certain interrogatories propounded by the defendant and answered by the plaintiff under oath and that the true and correct answers are as follows:

Answer to Interrogatory No. 2. I owned an undivided one-third interest in bench placer mining claim on the second tier and the right limit opposite the

lower half of Creek Claim No. 2, below Discovery on Dome Creek; also owned an undivided $1/12$ interest in and to bench placer mining claim on the second tier and the right limit opposite the upper half of Creek Claim No. 2, below Discovery on Dome Creek, both of said interests acquired from John Klonas in 1908 by purchase. I also owned an interest in Bench Claim No. 5 on the right limit of Dome Creek to the extent of \$17,500 gold dust mined from said claim by purchase and assignments of interests of Klonas in that certain option agreement made between said Klonas and one Mark Manson.

Answer to Interrogatory No. 3. Asheim and I each owned separately undivided interests in the placer mining claims described above. Our relations were those of separate owners of undivided interests in said claims. I cannot state positively what undivided interests were owned by said Asheim and my previous answer that he owned an undivided $1/8$ may not be correct. My previous answer that I owned an undivided $1/8$ was not correct. Sam Asheim would have owned an undivided one-half interest with me in placer claim No. 5 to the extent of \$17,500 of gold dust if he had paid me one-half of the amount I paid to secure the right to said \$17,500 of gold dust which he never did.

Answer to Interrogatory No. 4. The persons named were interested as part owners with me in the placer mining claims described in my answer to the 2nd Interrogatory, and Asheim would have owned an interest in the \$17,500 of gold dust if he had paid for the same which Asheim never did.

Answer to Interrogatory No. 5. I believe I never owned any interest in the ground litigated in the suit referred to, but do not know the suit by its number.

Answer to Interrogatory No. 6. Answered by reference to preceding answer.

Answer to Interrogatory No. 11. I have no knowledge as to the numbering of any of the suits in

the District Court of the Territory of Alaska, Fourth Division, but I owned the interests set forth in these corrected answers and believe the suit referred to is one in which I was interested to the extent before described. I also had an agreement with all the other part owners by which said owners interested in said claims, except David Cascaden, were to pay me 15 per cent for financing said suit and paying the expenses incidental thereto. The defendant, Henry Roden, was my attorney in said suit I refer to and wrongfully settled it while I was away from Alaska for much less than he was authorized to settle or compromise said suit for.

Answer to Interrogatory No. 12. I have no knowledge as to the numbering of suits in the District of Alaska. I owned the interests described in answer to the second Interrogatory and believe the suit referred to involved my interests in the claims described.

Answer to Interrogatory No. 13. I received about \$9,500 from the Washington-Alaska Bank after my return to Alaska about April, 1910, which I believe had been deposited in that bank to my credit by the defendant, Henry Roden.

ARTHUR E. GRIFFIN,
Attorney for Plaintiff.

Indorsed: Notice. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 23, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

NOTICE.

To the above named defendant and Messrs. Farrell, Kane and Stratton, attorneys for the defendant:

YOU AND EACH OF YOU Are hereby notified and will please take notice hereby that on the opening of Court at 9:30 a. m. on the 23d day of March, A. D. 1915, the plaintiff will move to amend his second amended complaint as follows, to-wit, by striking from

the fourth line of the fourth paragraph the following words: "and not otherwise representing the plaintiff."

ARTHUR E. GRIFFIN,
Attorney for Plaintiff.

Indorsed: Notice. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 23, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the
Western District of Washington.
Northern Division.

WILLIAM DETTERING, Plaintiff,
vs.

HENRY RODEN, Defendant.

No. 2726.

ORDER ENLARGING TIME.

Now on this 17th day of November, 1915, upon motion of Attorneys for Defendant, and for sufficient cause appearing, it is ordered that the time within which the Clerk of this Court may prepare, certify and transmit to the United States Circuit Court of Appeals the transcript of the record in this cause be, and the same is hereby extended to and including the 31st day of December, 1915.

JEREMIAH NETERER, District Judge.

Indorsed: Order Enlarging Time to Send Transcript to Circuit Court of Appeals. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 17, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

STIPULATION AS TO RECORD.

It is hereby stipulated by and between the parties hereto through their respective attorneys that the following designated papers, together with plaintiff's Ex-

hibits A, B, C, D and E, and defendant's Exhibits 1, 2 and 3, Original Citation, Original Writ of Error, comprise all papers, exhibits, depositions or other proceedings which are necessary to the hearing on said cause in the United States Circuit Court of Appeals, and in preparing the record in return to said Writ of Error, copies of such papers only, and no others, need be included. In preparing such papers all captions, except the name of the paper, and all verifications except where specially noted herein may be omitted; all endorsements except to show the name of the paper and the date of filing and all matter upon the covers of said papers, together with the numbering upon the pages shall be eliminated.

1st. All papers comprised in Transcript on Removal which includes the following: Affidavit of Service, Complaint, Notice, Petition of Removal, Bond on Removal, Order of Removal, Certificate of Superior Court Clerk (with captions, verifications and endorsements).

2nd. Amended Complaint.

3rd. Demurrer to Amended Complaint. Opinion on Demurrer.

4th. Second Amended Complaint.

5th. Answer and Amended Answer to Second Amended Complaint.

6th. Notice to Produce.

7th. Verdict.

8th. Bill of Exceptions. Motion and Order extending time for filing Bill of Exceptions.

9th. Opinion on Motion for New Trial.

10th. Judgment.

11th. Petition for Allowing Writ of Error, with endorsements.

12th. Assignment of Errors and prayer for Reversal, with endorsements.

13th. Original copy of Writ of Error, with endorsements, captions and acceptances of service.

14th. Order granting Writ of Error, and fixing amount of bond.

15th. Cost Bond on Writ of Error.

16th. Citations with return of service, endorsements and captions thereon.

17th. Stipulation as to Record.

18th. Order referring to Exhibits.

19th. Notices filed March 23d, 1915.

Dated this 19th day of November, 1915.

ARTHUR E. GRIFFIN,

GRIFFIN & GRIFFIN,

Attorneys for Plaintiff.

FARRELL, KANE & STRATTON,

Attorneys for Defendant.

Indorsed: Stipulation as to Record. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 19, 1915. Frank L. Crosby, Clerk; By E. M. L., Deputy.

In the District Court of the United States for the
Western District of Washington.
Northern Division.

WILLIAM DETTERING, Plaintiff,

vs.

HENRY RODEN, Defendant.

No. 2726.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD, ETC.

United States of America, Western District of Washington—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify the foregoing printed pages, numbered from 1 to 147, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of

said cause on Writ of Error therein, in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Defendant and Plaintiff in Error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to-wit:

Clerk's fee (Sec. 828 R. S. U. S.) for making record, certificate or return-folios at 15c	\$ 68.55
Certificate of Clerk to transcript of record, 4 folios at 15c.....	.60
Seal to said Certificate.....	.20
Certificate of Clerk to Original Exhibits, 3 folios at 15c.....	.45
Seal to said Certificate.....	.20
Statement of cost of printing said transcript of record, collected and paid.....	144.00
	<hr/>
	\$214.00
	\$ 70.00

I hereby certify that the above cost for preparing and certifying said record, amounting to \$70.00, has been paid me by Messrs. Farrell, Kane & Stratton, Attorneys for Defendant and Plaintiff in Error.

I further certify that I hereby attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, this 13th day of December, 1915.

(Seal)

FRANK L. CROSBY, Clerk.

In the United States District Court for the Western
District of Washington, Northern Division.

WILLIAM DETTERING, Plaintiff,

vs.

HENRY RODEN, Defendant.

No. 2726.

WRIT OF ERROR.

United States of America—ss.

The President of the United States of America, To the
Judges of the District Court of the United States
for the Western District of Washington, Northern
Division, GREETING:

Because of the judgment and proceedings, as also
in the rendition of the judgment of the plea which is
in the said District Court before you, or some of you,
between William Dettering and Henry Roden, a mani-
fest error hath happened, to the great damage of the
said Henry Roden, defendant, as is said and appears
by the Complaint, we being willing that such error, if
any hath been, should be duly corrected and full and
speedy justice done to the party aforesaid, in this
behalf, do command you, if any judgment be therein
given, that then, under your seal, distinctly and openly,
you send the record and proceedings aforesaid, with all
things concerning the same to the Justice of the United
States Circuit Court of Appeals for the Ninth Circuit,
at the court-room of said Court in the City of San
Francisco, in the State of California, together with
this Writ, so that you have the same at the said place
before the Justice aforesaid, within thirty (30) days

from the date of this writ, that the record and proceedings aforesaid being inspected the said Justice of the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

WITNESS the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 27th day of October, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States the one hundredth and thirty-ninth.

FRANK L. CROSBY, Clerk.

ED M. LAKIN, Deputy.

Clerk of the said District Court
of the United States for the
Western District of Washing-
ton.

The foregoing Writ is hereby allowed this 27th day of October, 1915.

JEREMIAH NETERER,

United States District Judge
for the Western District of
Washington.

Copy of the within Writ of Error received, and due service of same acknowledged this 27th day of October, 1915.

GRIFFIN & GRIFFIN,

Attorneys for Plaintiff.

Indorsed: Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 27, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court for the Western
District of Washington, Northern Division.

WILLIAM DETTERING, Plaintiff,

vs.

HENRY RODEN, Defendant.

No. 2726.

CITATION.

The United States of America—ss.

The President of the United States—To WILLIAM
DETTERRING, and his Attorneys—GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be
and appear at the United States Circuit Court of Ap-
peals for the Ninth Circuit, to be held at the City of
San Francisco, in the State of California, within thirty
(30) days from the date of this Writ, pursuant to the
terms of a Writ of Error filed in the Clerk's office of
the District Court of the United States for the Western
District of Washington, Northern Division, wherein
William Dettering is plaintiff and Henry Roden is
defendant; to show cause, if any there be, why the
judgment in said Writ of Error mentioned should not
be corrected and speedy justice should not be done to
the parties in that behalf.

WITNESS the Honorable Edward D. White, Chief
Justice of the Supreme Court of the United States of
America, this 27th day of October, A. D. one thousand
nine hundred and fifteen, and of the Independence of
the United States one hundred thirty-nine.

Dated this 27th day of October, 1915.

JEREMIAH NETERER,

United States District Judge
presiding in the United States
District Court for the Western
District of Washington, North-
ern Division.

Attest: FRANK L. CROSBY, Clerk.

By ED M. LAKIN, Deputy.

Clerk of the United States District Court for the Western District of Washington.

I hereby acknowledge due and regular service of the foregoing Citation in the City of Seattle this 27th day of October, 1915.

GRIFFIN & GRIFFIN,

Attorneys for William Dettering.

RETURN ON SERVICE OF WRIT.

United States of America, Western District of Washington—ss.

I hereby certify and return that I served the annexed Citation on the therein-named Service made on William Dettering by serving Griffin & Griffin, Attys. of record for plaintiff, by leaving a certified copy with A. E. Griffin. Served A. B. Griffin, a member of the firm of Griffin & Griffin, by leaving a certified copy with A. E. Griffin, by handing to and leaving a true and correct copy thereof with A. E. Griffin, personally, at Seattle, Washington, in said District, on the 28th day of Oct., A. D. 1915.

JOHN M. BOYLE, U. S. Marshal.

By MORTON D. WAINWRIGHT,
Deputy.

Marshal's Fees, \$4.12.

Indorsed: Citation. Filed in the U. S. District Court, Western District of Washington, Northern Division, Oct. 27, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY RODEN,

Plaintiff in Error,

vs.

WILLIAM DETTERING,

Defendant in Error.

ERROR TO DISTRICT COURT OF WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, Judge.

BRIEF OF PLAINTIFF IN ERROR

FARRELL, KANE & STRATTON,
STANLEY J. PADDEN,

Attorneys for Plaintiff in Error.

1011-1017 American Bank Building, Seattle, Wash-
ington.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY RODEN,

Plaintiff in Error,

vs.

WILLIAM DETTERING,

Defendant in Error.

STATEMENT OF THE CASE

This is an action brought by William Dettering, plaintiff, now defendant in error, vs. Henry Roden, defendant, now plaintiff in error. The complaint recites that the defendant was an attorney at law engaged in the practice of law at Fairbanks, Alaska, on the 17th day of February, 1910, and at that time the plaintiff was the owner of seventeen thousand dollars (\$17,000) in gold dust which was on deposit in the Washington Alaska Bank in Fairbanks, Alaska. That the plaintiff employed the defendant as his attorney to represent him in certain litigation then pending. The evidence shows that the defendant was given a power of attorney by the plaintiff and authorized to

act on behalf of the plaintiff during the plaintiff's absence in the States. The complaint charges that while the defendant was so acting as the attorney for the plaintiff, he the defendant wilfully, fraudulently and without authority withdrew, signed away, disposed of, and delivered over to other persons and wrongfully, wilfully and fraudulently consented and permitted to be delivered over to other persons adverse to the plaintiff the seventeen thousand dollars (\$17,000.00) in gold dust heretofore mentioned. The cause was originally commenced in the Superior Court of the State of Washington for King County. At a proper time the defendant, now plaintiff in error, filed his petition and bond praying the removal of the cause to the United States District Court for the Western District of Washington, Northern Division. The order of removal was duly signed and the cause transferred to the United States Court. After the case was docketed in the United States Court the defendant demurred to the complaint and subsequently answered. The case was set down for trial and brought on for hearing before the court sitting with a jury. The jury returned a verdict against the defendant, now plaintiff in error, in the sum of sixty-five hundred dollars (\$6,500.00) upon which verdict a judgment has been duly entered and from said judgment the defendant, now plaintiff in error, has secured a writ of error.

ASSIGNMENT OF ERROR

The plaintiff in error's first assignment of error reads as follows:

I.

"The Court erred in considering the cause or any part thereof, and in entering judgment therein, because it affirmatively appeared from the files and proceedings that the defendant was at the commencement of the action and at all the times mentioned in the Complaint, a resident and citizen of the Territory of Alaska, and remained such at all times after the commencement of the action and of the filing of judgment herein, and that the plaintiff was at all of said time a resident and citizen of the State of Washington. That because of said facts the cause was not removable to the United States District Court for the Western District of Washington, Northern Division, and the said Court had no jurisdiction of the persons or the subject matter hereof."

The plaintiff in error's second assignment of error charges that the Court erred in denying the challenge of the sufficiency of the evidence and for an instructed verdict made at the close of the evidence by the defendant, which error is based upon the following grounds:

"(a) Because it affirmatively appears upon the record and pleadings and from all the proceedings that the Court had no jurisdiction of the parties or of the subject matter of the action, because the cause was between a citizen of the Territory of Alaska and the State of Washington and was not removable to the United States District Court for the Western District of Washington."

The only question before the Court is, did the United States District Court for the Western District of Washington, Northern Division, have jurisdiction over the cause and was the cause one which was removable from the State to the Federal Court?

ARGUMENT

The petition for removal is based upon a diversity of citizenship and recites in part as follows:

“The entire controversy therein is between the above named plaintiff, William Dettering, on the one side, who at the time of the commencement of this action was, ever since has been and now is a citizen of the United States, a citizen of the State of Washington, residing in the Western District of Washington and residing in King County, State of Washington, and residing within the jurisdiction of this court; and your petitioner, Henry Roden, the above named defendant on the other side, is not now and was not at the time of the commencement of this action and never has been at any time whatsoever a citizen or resident of the State of Washington, but is now and at all times has been a citizen and a resident of Alaska.” (See Transcript of Record, p. 9.)

The affidavit upon the bond of removal signed by Henry Roden the plaintiff in error recites that he is now and for the past seventeen years has been a resident of the Territory of Alaska; that at the present time he is a resident and citizen of Alaska, residing at Iditarod; that he is not now and never has been a resident of the State of Washington. Paragraph I of plaintiff's amended complaint recites as follows:

“That the defendant now is and at all times hereinafter named was an attorney at law duly authorized and licensed to practice law in the District of Alaska.” (Transcript of Record, p. 14.)

The testimony of Henry Roden undisputed is as follows:

“I am defendant in this case. I arrived in Alaska in February, 1908. I went in through Canadian territory; in 1910 I went into the Iditarod country and have been there ever since.” (Transcript of Record, p. 110.)

It is apparent from the petition on removal and from the foregoing citations that the defendant in error was at the time of the commencement of the action and at the time of filing the petition and at the time of hearing of the cause a resident and citizen of the Territory of Alaska. The plaintiff in error now contends that the District Court had no jurisdiction over the cause and that this court has no jurisdiction over the cause for the reason that the Federal Statutes do not give Federal Courts jurisdiction over cases between residents and citizens of a territory and residents and citizens of a state. The judicial code enacted March 3, 1911 (see Federal Statutes Ann. Vol. 1 Supplement, 1912, pp. 139-145), provides that the district courts of the United States shall have original jurisdiction as follows:

“Sec. 24. Of all suits of a civil nature at common law or in equity * * * where the matter in controversy exceeds exclusive of interest and costs the

sum or value of three thousand dollars (\$3,000) * * * and (b) is between citizens of different states.”

Section 28 provides:

“Any other suit of a civil nature at law or in equity of which the district courts of the United States are given jurisdiction by this title and which are now pending or may hereafter be brought in any state court may be removed into the district court of the United States for the proper district by the defendant or defendants therein being non-residents of that state. * * * And where a suit is now pending or may hereafter be brought in any state court in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the District Court of the United States for the proper district. * * *”

It will be seen from these citations that the United States District Courts have original jurisdiction only when the controversy is between citizens of different states and that causes are removable only in such cases where the United States District Courts have this original jurisdiction or in such cases where the controversy is between a citizen of the state in which the suit is brought and a citizen of another state.

In *Re Winn*, 213 U. S., p. 456, 53 L. Ed. 873, the Supreme Court of the United States said:

“It is well settled that no cause can be removed from the state court to the circuit court of the United States unless it could originally have been brought

in the latter court. *Boston & M. Consol. Copper & S. Min. Co. vs. Montana Ore Purchasing Co.*, 188 U. S. 632, 47 L. Ed. 626, 632, 23 Sup. Ct. Rep. 434; *Ex parte Wisner*, 203 U. S. 449, 51 L. Ed. 264, 27 Sup. Ct. Rep. 150.”

Therefore the sole question in this case is, does the record show that the plaintiff in error was a resident and citizen of any other state or of a state?

The plaintiff in error now contends that it does not so show but that it affirmatively appears that he at all times was a resident and citizen of the Territory of Alaska, and that a resident and citizen of a territory is not a resident and citizen of a state as required by the act giving jurisdiction to the United States District Courts either original or on removal. In the first place it is finally settled that Alaska is a territory and a part of no state.

See *Interstate Commerce Commission ex rel. Humboldt S. S. Co.*, 224 U. S. 472, 56 L. Ed. 849.

It is also firmly settled that when one of the parties to an action is a resident and citizen of a territory then the parties are not “citizens of different states,” and there is not such a diversity of citizenship as is required to give the Federal Courts jurisdiction over the case.

In the *Corporation of New Orleans vs. Winter, et al.*, 1 Wheaton, p. 90, 4 L. Ed., p. 44, the Supreme Court of the United States said:

“Marshall, Ch. J., delivering the opinion of the Court, and after stating the facts, proceeded as follows:

“The proceedings of the court, therefore, is arrested *in limine*, by a question respecting its jurisdiction. In the case of *Hepburn & Dundas vs. Ellzey*, this Court determined, on mature consideration, that a citizen of the District of Columbia could not maintain a suit in the Circuit Court of the United States. That opinion is still retained.

“It has been attempted to distinguish a territory from the District of Columbia; but the court is of the opinion that this distinction cannot be maintained. They may differ in many respects, but neither of them is a state, in the sense in which that term is used in the constitution. Every reason assigned for the opinion of the Court, that a citizen of Columbia was not capable of suing in the courts of the United States, under the judiciary act, is equally applicable to a citizen of a territory. Gabriel Winter, then, being a citizen of the Mississippi territory, was incapable of maintaining a suit alone in the Circuit Court of Louisiana.”

In the case of *Barney vs. Baltimore*, 73 U. S., p. 280, 18 L. Ed. 825, at page 827, the Court said:

“In the case of *Hepburn vs. Ellzey*, 2 Cranch, 545, it was decided by this Court, speaking through Marshall, Ch. J., that a citizen of the District of Columbia was not a citizen of a state within the meaning of the Judiciary Act, and could not sue in a Federal Court. The same principle was asserted in reference to a citizen of a territory in the case of *N. O. vs. Winter*, 1 Wheat., 91, and it was there held to defeat the jurisdiction, although the citizen of the Territory of Mississippi was joined with a person who, if suing alone, could have maintained the suit. These rulings have never been disturbed, but the principle asserted has been acted upon ever since by the courts, when the

point has arisen. *Westcott vs. Fairfield*, 1 Pet. C. C. 45."

See also:

Hooe vs. Jamison, 17 Supreme Court Rep., 596,
166 U. S., p. 395.

Cameron vs. Hodges, 8 Sup. Ct. Rep., 1154,
127 U. S., p. 322.

To like effect are:

Snead vs. Sellers, 66 Fed. 371.

California Oil & Gas Co. vs. Miller, 96 Fed. 12.

Weller vs. Hanaur, 105 Fed. 193.

Watson vs. Bonfils, 116 Fed. 157.

McClelland vs. Kane, 154 Fed. 164.

Maxwell vs. Federal Gold & Copper Co., 155
Fed. 110.

Clark vs. Southern Pacific Railroad, 175 Fed.
124.

It is well settled that where no district court has jurisdiction over the cause such jurisdiction cannot be conferred by the consent or by any act of the parties. It is the duty of the appellate court to investigate the jurisdiction of the lower court on its own motion even though such jurisdiction is not questioned by the parties.

See *Louisville & N. R. Co. vs. Mottley*, 211 U. S. 149, and cases cited.

Also *Re Winn*, 211 U. S. 458, 53 L. Ed. 873.

Rife vs. Lumber Underwriters, 204 Fed. 32, and cases cited.

In *Utah Nevada Co. vs. DeLamar*, 133 Fed. 113, this Court (Circuit Court of Appeals for 9th Circuit) speaking through Judge Hawley, said:

“The question of the jurisdiction of the Court in cases like the present one can be taken at any time pending the proceedings. It need not be presented by any assignment of error. It may be raised by the Court of its own motion. Failure of the parties to raise the question, or consent to waive it, does not prevent the Court from considering it. This Court has twice so decided. *Craswell vs. Belanger*, 56 Fed. 529, 6 C. C. A. 1; *German Savings & Loan Soc. vs. Dormitzer*, 116 Fed. 471, 53 C. C. A. 639. In *Minnesota vs. Northern Securities Co.*, 194 U. S. 48, 62, 24 Sup. Ct. 598, 48 L. Ed. 870, the Court Said:

‘After the cause was argued here, the parties were invited to submit briefs upon the question whether the Circuit Court of the United States could take cognizance of the case upon removal from the state court. From the briefs filed in response to that invitation it appeared that both sides deemed the case a removable one, and insist that this court should consider the merits as disclosed by the pleadings and evidence. But consent of parties can never confer jurisdiction upon a federal court. If the record does not affirmatively show jurisdiction in the Circuit Court, we must, upon our own motion, so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by statute. *Mansfield, C. & L. M. Railway Co. vs. Swan*, 111 U. S. 379, 382, 4 Sup. Ct. 510, 28 L. Ed. 462; *Robertson vs. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *King Bridge Co. vs. Otoe County*, 120 U. S. 225, 7 Sup. Ct. 552, 30 L. Ed. 623; *Parker vs. Ormsby*, 141 U. S. 81, 11 Sup. Ct. 912, 35 L. Ed. 654; *Mattingly vs. Northwestern Va. R. R.*, 158 U. S. 53, 57, 15 Sup. Ct. 725, 39 L. Ed. 894; *Great Southern Fire Proof Hotel Co. vs. Jones*, 177 U. S. 449, 453, 20 Sup. Ct. 690, 44 L. Ed. 482; *Continental National Bank vs. Buford*, 191 U. S. 119, 24 Sup. Ct. 54, 48 L. Ed. 119; *Defiance Water Co. vs. Defiance*, 191 U. S. 184, 194, 24 Sup. Ct. 63, 48 L. Ed. 140.’ ”

The question of jurisdiction can be raised at any

stage of the proceedings and the fact that the party claiming lack of jurisdiction was the one who removed the cause does not estop that party from raising the question in the appellate court.

In *German Savings & Loan Society vs. Dormitzer*, 116 Fed. 471, the Court, speaking through Judge Ross, said:

“This suit was commenced in a state court of Washington, from which, on the petition of the appellant, it was transferred to the Circuit Court of the United States for the District of Washington, in which court it was tried on its merits, and a decree entered therein, from which decree the German Savings & Loan Society took and was allowed an appeal. Upon the calling of the case for argument in this court, counsel for the appellant announced that they had just discovered that the suit was improperly removed from the state court, and that the circuit court had not, nor has this court, any jurisdiction over it, for the reason that the case presented no separable controversy, nor did such diverse citizenship exist as would confer jurisdiction upon the federal court. As the case was removed from the state court upon the petition of the appellant, it is insisted on the part of the appellees that it is estopped from now raising the question of jurisdiction. * * * In the case of *Railroad Company vs. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462, and in other cases there cited, the supreme court declared the rule to be inflexible and without exception that the judicial power of the United States cannot be exerted in a case to which it does not extend, even if both parties desire it to be exerted; and that the court ‘must, of its own motion, deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record, on which, in the exercise of that

power, it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.' See, also, *Craswell vs. Belanger*, 6 C. C. A. 1, 56 Fed. 529, and numerous cases there cited."

Because of the apparent jurisdictional defect we deem it useless to discuss the remaining assignments of error.

We respectfully submit that the judgment of the District Court should be set aside.

FARRELL, KANE & STRATTON,
and STANLEY J. PADDEN,
Attorneys for Plaintiff in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM DETTERING,

Defendant in Error,

vs.

HENRY RODEN,

Plaintiff in Error.

ERROR TO DISTRICT COURT OF WEST-
ERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HON. JEREMIAH NETERER, Judge.

Brief of Defendant in Error

Respectfully submitted,

GRIFFIN & GRIFFIN,

Attorneys for Defendant in Error.

1220 Alaska Bldg., Seattle, Wash.

Filed

SEP 5 - 1916

F. D. Monckton,

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM DETTERING,

Defendant in Error,

vs.

HENRY RODEN,

Plaintiff in Error.

STATEMENT

Plaintiff in error in the absence of and while acting as attorney for defendant in error William Dettering, by virtue of a power of attorney made in his favor, withdrew and disposed of \$17,500 in gold dust which Mr. Dettering had deposited in the Washington-Alaska Bank of Fairbanks as collateral security for a promissory note of a little over \$9,000 held in that bank for collection. Upon Mr. Dettering's return to Fairbanks, Roden denied having any knowledge of what disposition had been made

of the \$17,500, and claimed that it had been withdrawn and dissipated without his knowledge or consent, when in truth he had signed Mr. Dettering's name to a written agreement disposing of it to the officers of the Washington-Alaska Bank and confederates who had been litigating the rights of Mr. Dettering and others to mining property situate on Dome Creek, Fairbanks district of Alaska.

Shortly thereafter the bank failed and the \$17,500 was lost to Mr. Dettering through the wrong of his attorney in signing it away and in wrongfully denying having any knowledge of its disposition.

Plaintiff in error removed the cause from the Superior Court of King County, State of Washington, in which it was brought, and now seeks, after a verdict of a jury and judgment against him, to take advantage of his own wrong by claiming the court to which he and his attorneys removed it has no jurisdiction.

The cases cited by plaintiff in error to sustain his claim were all cases which had originally been commenced in the United States courts, and none of them were cases which had been removed to the Federal Court and in which the party sought to take advantage of his own wrong upon the extremely technical point, that a citizen of a *Territory*

is not a citizen of a *State* within the meaning of the statute authorizing removal of causes to the District Courts where the necessary diversity of citizenship otherwise exists.

The language of the removal statute is less technical in that Sec. 28 Judicial Code provides:

“Any other suit of a civil nature at law or in equity of which the district courts of the United States are given jurisdiction by this title, and which are now pending or may hereafter be brought in any state court, may be removed to the district court of the United States for the proper district by the defendant or defendants therein being NON RESIDENTS of that state.”

The decisions relied on by plaintiff in error have been much criticized as technical in the extreme and unworthy of the great Chief Justice.

See *Watson vs. Brooks*, 13 Fed. 543.

The rule should not be extended to accommodate and include a case which was originally brought in the State courts and removed to the District Court, especially when no objection was made to the jurisdiction until the defendant had suffered defeat in a court of his own selection.

Plaintiff in error should be estopped from setting up and taking advantage of his own wrong.

In the case of *Talbott vs. Silver Bow County Commissioners*, 139 U. S. 438, 35 L. Ed. 210, the court held Section 5219, Rev. Stat., to include the right to tax national banks situate in the Territory of Montana, although the act by its terms only authorized the taxing of national banks situate in the states to be taxed.

The Territory of Washington was held to be a *State* within the Seaman's Act of July 20th, 1790, in the case of *In re Bryant*, Federal Cases No. 2067.

Should the court, however, feel bound to follow the decisions rendered in cases which were instituted in the Federal Courts it will then be its duty to order the cause remanded to the court from which it was wrongfully removed and to assess all the costs of both this and the District Court, including attorneys' fees, against the plaintiff in error whose wrongful act caused the removal.

In the case of *Mansfield L. M. Ry. Co. vs. Swan*, 111 U. S. 379, the taxation of costs in cases wrongfully removed is fully discussed and the costs of both courts taxed against the party wrongfully removing the case from the State Court.

In the case of *Hanrick vs. Hanrick*, 153 U. S. 191, 38 L. Ed. 688, the court says:

“Brady having wrongfully removed the

case into the circuit court must pay the costs in that court as well as the costs of the three appeals to this court.”

Torrence vs. Shedd, 144 U. S. 527, 36 L. Ed. 528.

Graves vs. Corbin, 132 U. S. 571, 33 L. Ed. 462.

In the case last above cited the court says:

“Under the provision of Section 5 of the Act of March 3, 1875 (18 Stat. 472), that if in any suit removed from a state to a circuit court of the United States, it shall appear to the satisfaction of said circuit court at any time after such suit has been removed thereto, that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, it shall proceed no further therein, but shall remand the suit to the court from which it was removed as justice may require. This court has held that when it appears to this court that the case is one of which under the provision the circuit court should not have taken jurisdiction it is the duty of this court to reverse any judgment given below and remand the cause with costs against the party who wrongfully invoked the jurisdiction of the circuit court. *Williams vs. Nottawa Twp.*, 104 U. S. 209 (26:719). This rule has been recognized by this court to the extent even of taking notice of the want of jurisdiction in the circuit court, although the point has not been formally raised in that court or in this court in *Turner vs. Farmers Loan and Trust Co.*, 106 U. S. 552, 558; *Mansfield*,

etc., vs. Swan, 111 U. S. 379; *Farmington vs. Pillsbury*, 114 U. S. 138, 146, and *King Bridge Co. vs. Otoe County*, 120 U. S. 225.”

Martin vs. Snyder, 148 U. S. 662, 37 L. Ed. 602.

Mattingly vs. Northwestern Virginia R. R. Co., 158 U. S. 53, 39 L. Ed. 894.

Pellett vs. Great Northern Ry. Co., 105 Fed. 194.

The case of *Stevens vs. Nichols*, 130 U. S. 230, 32 L. Ed. 914, was one in which it was sought to have applied in satisfaction of a judgment obtained against a car company amounts due from two of its subscribers to its capital stock. The stock subscribers removed the cause to the Circuit Court of the United States, where it was tried without objection being made to that court's jurisdiction. Upon appeal by the stock subscribers to the Supreme Court it was held the petition for removal was insufficient, and the cause was ordered remanded to the State Court with direction that the person who caused the removal pay all costs of the Supreme and Circuit Courts.

Respectfully submitted,

GRIFFIN & GRIFFIN,

Attorneys for Defendant in Error.

1220 Alaska Bldg., Seattle, Wash.

Dec 2713

United States

Circuit Court of Appeals

For the Ninth Circuit.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Alaska, Division No. 1.

Filed

JAN 26 1916

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,
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District of Alaska, Division No. 1.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Counsel.]

HELLENTHAL & HELLENTHAL, Juneau,
Alaska,

Attorneys for Plaintiff in Error.

JOHN H. COBB, Juneau, Alaska,
Attorney for Defendant in Error.

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

Case No. 1325-A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES,

Defendant.

Praeipie [for Transcript of Record].

Kindly prepare certified copies for transmission to the United States Circuit Court of Appeals in connection with your return of the Writ of Error herein as follows: Original Complaint, Demurrer to Complaint, Answer, Reply, Findings of Fact and Conclusions of Law, and Judgment (all in one), Bill of Exceptions, Petition for Writ of Error and Order allowing same, Assignment of Errors, Bond on Writ of Error, Writ of Error and Citation on Writ of Error. Two Opinions.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendant.

*Page-number appearing at foot of page of original certified Record.

Filed in the District Court, District of Alaska,
First Division. Dec. 10, 1915. J. W. Bell, Clerk.
By L. E. Spray, Deputy. [1a*]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1325-A.

THE TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Complaint.

The above-named plaintiff complaining of the
above-named defendant, for cause of action alleges:

I.

The defendant is a corporation, duly incorporated,
and owning property and engaged in the fishing busi-
ness in the Territory of Alaska.

II.

That during the month of June, 1915, and con-
tinuously up to the present time, the defendant was
engaged in and prosecuting and attempting to prose-
cute the business of fishing by means of fish-traps
situate in the waters of Alaska.

That during all said period the defendant was en-
gaged in operating twenty-two (22) fish-traps, the
precise locations of which said traps are to the plain-
tiff unknown, but they are all within the waters of
Southeastern Alaska and subject to the tax herein-
after alleged.

III.

That by an act of the Alaska legislature, approved [2] April 29th, 1915, entitled "An act to establish a system of taxation, create revenue, and provide for collection thereof, for the Territory of Alaska, and for other purposes; and to amend an act entitled "An act to establish a system of taxation, create revenue and provide for collection thereof for the Territory of Alaska, and for other purposes," approved May 1, 1913, and declaring an emergency,"—each and every one of said traps became and is subject to the payment of a license tax of One Hundred Dollars (\$100) each for the year 1915, which said tax, by the terms of said act, became due and payable on the 1st day of July, 1915.

IV.

That the defendant, though prosecuting the business aforesaid for the current season of fishing, has failed, neglected and refused to pay said license tax or any part thereof.

WHEREFORE, plaintiff sues and prays judgment for the sum of Twenty-two Hundred Dollars (\$2,200), with interest thereon at the rate of eight per cent per annum from the 1st day of July, 1915, and all costs and disbursements herein incurred.

J. H. COBB,

Chief Counsel for the Territory of Alaska. [3]

United States of America,
Territory of Alaska,—ss.

J. H. Cobb, being first duly sworn, on oath deposes and says: I am chief counsel for the Territory of

Alaska. The above and foregoing complaint is true as I verily believe.

J. H. COBB.

Subscribed and sworn to before me this 7th day of July, A. D. 1915.

[Notarial Seal]

E. L. COBB,

Notary Public in and for Alaska.

My commission expires Dec. 3, 1918.

Filed in the District Court, District of Alaska, First Division. Jul. 10, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy.

[Endorsed]: Original No. ——. In the District Court for the Territory of Alaska, Division No. 1, at Juneau. The Territory of Alaska, Plaintiff, vs. Alaska Pacific Fisheries, a Corporation, Defendant. Complaint. J. H. Cobb, Chief Counsel for the Territory of Alaska. [4]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

Case No. 1325-A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Demurrer.

Comes now the above-named defendant and demurs to the complaint of the plaintiff herein, and for cause of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That the act of the Alaska legislature, approved April 22, 1915, referred to in the complaint and upon which the alleged liability of the defendant is based, is invalid and void.

III.

That the act of the Alaska legislature approved April 22, 1915, referred to in the complaint, is in conflict with the Organic Act, the Laws of the United States and the Constitution of the United States, and is such that the territorial legislature did not possess the power and authority under the Organic Act to enact the same. [5]

IV.

That the tax attempted to be laid by the act referred to in the complaint is not uniform upon the same class of subjects in this that an attempt is made to tax fish-traps and gill-nets while seines are not taxed. Thereby imposing a burden on those fishing by means of traps and gill-nets, not imposed upon those fishing by means of seines, and the act is for that reason void to the extent that fish-traps are sought to be taxed.

V.

That the act referred to in the complaint is void for the reason that it is an attempt to lay and collect a tax without any reference to the value of the thing taxed, contrary to the provisions of the Organic Act in that regard.

VI.

That the tax imposed by the act, referred to in the complaint, is in fact a specific tax on property, and as such is levied without any reference to the value of the property sought to be taxed, to wit, the fish-traps, contrary to the provisions of the Organic Act in that regard.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant.

Due service by copy admitted this 27th day of July, 1915.

J. H. COBB,

Attorney for Plaintiff.

Filed in the District Court, District of Alaska,
First Division. Jul. 29, 1915. J. W. Bell, Clerk.
By —————, Deputy [6]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

Case. No. 1325-A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Answer.

Comes now the defendant and for answer to the complaint of the plaintiff herein, admits, denies and alleges as follows:

I.

The defendant admits that it is a corporation duly

incorporated and owning property in the Territory of Alaska, and engaged in the fishing business in said Territory, as said fish business is hereinafter more particularly described.

II.

The defendant denies that during the month of June, 1915, or at any other time, it was engaged in prosecuting, or attempting to prosecute, the business of fishing by means of fish-traps, situate in the waters of Alaska or elsewhere, and in this connection the defendant avers:

That it is the owner of salmon cannaries, situate in Southeastern Alaska, and that it is engaged in catching, packing and canning salmon and that in connection with the operation of such canneries it catches, packs, cans and ships salmon; that it is the owner of eighteen (18) fish-traps, situate in the waters of Southeastern Alaska, and that each [7] and all of said fish-traps are appliances used by it in connection with its operation of said canneries and that said traps and all of them are part of the cannery property used exclusively for the purpose of catching fish to be canned in the defendant's canneries;

That the defendant is not engaged in the business of operating fish-traps, or in the business of fishing by means of fish-traps; that it does not sell any of the fish caught in any of its said traps until the same have been canned at its said canneries and makes no use whatsoever of said fish-traps, except in the operation of its said canneries.

Further answering paragraph two (2) of the com-

plaint of plaintiff herein, the defendant denies that it is the owner of, or that it operates, twenty-two (22) fish-traps but avers that it is the owner of eighteen (18) fish-traps used by it as in this paragraph above specified. In this connection the defendant further avers:

That it has complied with all the provisions of chapter three, title seven of the Compiled Laws of Alaska, relating to fish and fisheries, including the provisions of sections 259, 260, 261, 262, 263, 264, 265, 267, 268, 269, 270, 271, 272, 273, 274, 275 and 275-a, and has paid license taxes on its business and output as by said act of Congress required, and has in all respects complied therewith.

III.

Answering paragraph three (3) of plaintiff's complaint the defendant avers:

That it admits that the territorial legislature of the Territory of Alaska passed the act referred to in said [8] paragraph, but the defendant denies that it is the owner of any fish-traps subject to the payment of any license tax under said act, and in this connection, the defendant further avers:

That said act is invalid and void, among others, for the reasons following:

First. That said act attempts to alter, amend and change the fish laws passed by the Congress of the United States, prior to the adoption of the Organic Act and in force at the time said act was adopted, which said attempt is contrary to the provisions of said Organic Act and renders the act void, as an act passed without authority.

Second. That the purported license tax sought to be collected in this action is not a license but a tax and is sought to be collected in violation of the provisions of the Organic Act of the Territory of Alaska in this that the act is a revenue measure pure and simple, and that the license sought to be collected *are* not sought to be collected for the purpose of regulation, but for the purpose of taxation only; that the amount imposed is far in excess of the amount required to issue the license, to regulate and inspect the thing sought to be licensed and to do such other things as might be done by the Territory under its police powers; and that the express object of the act is not regulation, but taxation, and as such is in violation of the provisions of the Organic Act, which requires, "That all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessment shall be according to the actual value thereof. No tax shall be levied for territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year." [9]

And further that said attempt to tax is in violation of the last quoted provision of the Organic Act in this, the natural conditions in Southeastern Alaska are such that it is practical to catch salmon by means of traps and gill-nets, and such that a seine cannot be used, while the natural conditions in Western Alaska are such that it is not practical to catch fish by means of traps and gill-nets, but the seine is the device used, in the last mentioned locality for that purpose. There are a great many sal-

mon canneries in Southeastern Alaska and the fish canned in these canneries are nearly all caught by means of traps and gill-nets. There are also a large number of canneries in Western Alaska and the fish there canned are nearly all caught by the use of seines.

That the defendant owns three canneries, all of which are situate in Southeastern Alaska, and all of which are so situate that the fish canned at said canneries must be caught either by means of a trap or gill-net, since the natural conditions in the Territory from which these fish must come do not admit of the use of a seine.

That to the Westward, along the Alaskan coast, different conditions prevail; that the practical methods of fishing there is by means of seines; that in that locality seines are almost exclusively used by the canneries in procuring fish to be canned and packed at the canneries there situate; that if this act should be enforced and the defendant be required to pay the tax therein assessed against it because of the fact that it employs fish-traps and gill-nets in order to supply its canneries with fish, it would be greatly handicapped in meeting in the market its competitors, who [10] operate canneries to the westward along the Alaskan coast and in the Alaskan waters, where the use of seines is practical and where the fish are caught and the canneries supplied by means of the use of seines.

That said tax for the reasons stated is not uniform upon the same class of subjects; is not assessed according to the actual value thereof and is levied

without reference to whether it is in excess of one per cent upon the assessed valuation of the property, and without making any assessment whatsoever, and that as to many of the traps owned by the defendant, the tax of one hundred (\$100) dollars per trap greatly exceeds one per cent upon the actual value of said traps in that some of the defendant's traps are not worth to exceed twenty-five hundred (\$2,500) dollars.

That the defendant cannot supply its canneries with fish except by using traps and gill-nets, which are taxed under the provisions of the act referred to in the complaint, while its competitors operating canneries in Western Alaska supply their canneries with fish by the use of seines, the use of which the natural conditions in that locality permit; that the defendant and all others similarly situated are obliged to sell their fish in the same market where the fish canned by the canneries situate in Western Alaska is marketed. That by reason of these facts the defendant is denied the privilege of fishing without paying the tax on trap and gill-nets exacted by said act, while its competitors are allowed to exercise the privilege of fishing freely;

That by reason thereof, as well as the other matters and things hereinbefore set forth, said act is in violation of the fourteenth amendment to the Constitution of the United States. [11]

IV.

Replying to paragraph four of the plaintiff's complaint, the defendant denies that it is prosecuting the business therein referred to, and avers that it is

engaged in the business hereinbefore set forth, prosecuted in the manner hereinbefore set forth, but admits that it has failed and refuses to pay the license tax sought to be collected by this action, or any part thereof, for the reasons herein stated.

And for further defense to the allegations of the complaint herein, the defendant avers:

That the act upon which the complaint herein is based and under which the prosecution is had was enacted or claimed to be enacted by the legislature of the Territory of Alaska in the year 1915.

That the session of the legislature which passed or claimed to have passed the above-entitled act convened on the first Monday in March, 1915, in the city of Juneau, Alaska, and continued in session for a period of sixty days, during which period they failed to pass and enact the act above referred to, and that said act, upon which the prosecution herein is had, was passed after the legislature had been in session for more than sixty days, and that the Governor of the Territory of Alaska did not call an extraordinary session to pass said act.

WHEREFORE, the defendant prays that the plaintiff's complaint be dismissed; that it take nothing by reason thereof; and that it have and recover from the plaintiff its costs and disbursements herein incurred.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant. [12]

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Aug. 26, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy.

ORIGINAL No. 1325-A. In the District Court for the Territory of Alaska, Division No. 1. The Territory of Alaska, Plaintiff, vs. Alaska Pacific Fisheries, a Corporation, Defendant. Answer. Hellenthal & Hellenthal, Attorneys for Defendant. Office: Juneau, Alaska.

Due service by copy of the within admitted this 26th day of Aug. 1915.

J. H. COBB,
Attorney for Plaintiff. [13]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1325-A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Reply.

Now comes the plaintiff by J. H. Cobb, Chief Counsel for the Territory of Alaska, and for reply to the affirmative answer of the defendant alleges:

The plaintiff denies all and singular the allegations in said affirmative answer contained.

J. H. COBB,
Chief Counsel.

United States of America,
Territory of Alaska,—ss.

J. H. Cobb being first duly sworn on oath deposes

and says: I am the chief counsel for the Territory of Alaska. The above and foregoing reply is true as I verily believe.

J. H. COBB.

Subscribed and sworn to before me this 11th day of November, 1915.

E. L. COBB,

Notary Public in and for Alaska.

My commission expires Dec. 3, 1918.

Filed in the District Court, District of Alaska, First Division. Nov. 13, 1915. J. W. Bell, Clerk.
By L. E. Spray, Deputy. [14]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1325-A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Judgment.

This cause came on regularly for trial upon the complaint, answer and reply; and thereupon came the plaintiff by Mr. J. H. Cobb, and the defendant by Messrs. Hellenthal & Hellenthal, and all parties announced ready for trial; and filed a stipulation in writing waiving a jury and submitting the cause to the Court; and the respective parties also made, signed and filed their stipulation in writing as to all

facts in the case, of which stipulation the following also was a part to wit: "If the Court shall find under the law that judgment should go for the plaintiff, said judgment shall be for the sum of Nineteen Hundred Dollars (\$1,900) with interest thereon from July 1st, 1915, from which judgment a writ of error or appeal may be prosecuted as provided by law"; The said facts so stipulated are as follows, to wit:

I.

The defendant, The Alaska Pacific Fisheries, is a corporation duly incorporated and owning property and doing business in the Territory of Alaska.

II.

The said defendant is the owner of 19 fish-traps situate within the waters of Southeastern Alaska, which [15] said traps and each and all of them it operated during the fishing season of 1915, to wit, during the months of June, July and August, taking fish therein.

III.

That none of the fish taken by the defendant in any one of its said fish-traps operated by it as afore-said, was sold by the defendant prior to being canned, but all the fish so caught were utilized by the defendant in connection with the operation of certain canning plants owned by it in which said fish were canned and thereafter sold as canned salmon, and the defendant has not otherwise engaged in the fish-trap business.

IV.

That some of the canneries in the Territory of Alaska are so situate that because of natural con-

ditions they are obliged to supply the fish canned by resorting to the use of fish-traps, while others are so situate because of natural conditions that the fish can be supplied in no other practical manner except by the use of gill-nets, while still others are so situate that the fish cannot be supplied except by the use of seines; that the canneries of the defendant are so situate that seines cannot be practically used in connection with the catching of the fish canned or in connection with the furnishing of the fish supplied for its canneries, but it is obliged to resort to the use of fish-traps for that purpose.

V.

The defendant has complied with all the provisions of chapter 3, title 7, of the Compiled Laws of the Territory of Alaska relating to fish and fisheries including the provisions of sections 259 to 275-A inclusive, and has paid the license tax provided for by said sections. [16]

VI.

The defendant has not paid the tax sued for in this action for 1915, or any part thereof.

VII.

The second session of the legislature which passed the act which forms the basis of this action, to wit, chapter 76, Session Laws of Alaska, 1915, convened on the 1st day of March, 1915, at 12 o'clock noon; that on the 29th day of April, 1915, said legislature adjourned, *sine die*, at 12 o'clock midnight, according to the official time-piece of said legislature, that is to say, the clocks hanging in the halls of the two Houses of the legislature were stopped or turned

back by the sergeant-at-arms just prior to the hour of 12 o'clock midnight of April 29th, 1915, and thereafter between the hours of 3 and 4 o'clock A. M., sun time, of April 30th, 1915, while the clocks in said halls of the legislature still indicated prior to midnight, being stopped or turned back as aforesaid, the said act, namely chapter 76 of the Session Laws of Alaska, 1915, was finally passed by both Houses of the legislature and approved by the Governor and was enrolled and filed in the office of the Secretary of State for the Territory as it now appears in the printed volume of the Session Laws of Alaska, 1915, chapter 76; that the Governor of the Territory of Alaska did not call an extra session to pass said act.

VIII.

Some of the said traps of defendant are worth upwards of \$10,000 and some are worth not to exceed \$1,000.

And from the foregoing the Court finds as facts herein the matters and things in said stipulation, contained; and from the facts so found and the stipulation aforesaid the Court concludes as a matter of law that the plaintiff is entitled to judgment for the sum of Nineteen Hundred [17] and Sixty-three Dollars (\$1,963) and costs, to which ruling of the Court the defendant then and there excepted.

IT IS THEREFORE CONSIDERED BY THE COURT, and is so ordered and adjudged that the plaintiff, the Territory of Alaska, do have and recover of and from the defendant the Alaska Pacific Fisheries, a corporation, the sum of Nineteen Hundred and Sixty-three Dollars (\$1,963) with interest

thereon from the date hereof at the rate of eight per cent per annum, and all costs incurred, for all of which let execution issue.

Defendant is allowed thirty days from this date in which to file bill of exceptions.

Dated this 1st day of December, 1915.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska,
First Division. Dec. 2, 1915. J. W. Bell, Clerk.
By L. E. Spray, Deputy. [18]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

Case. No. 1325-A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that the defendant herein, duly and regularly and within the time prescribed therefor, filed its demurrer, which is in words and figures as follows:

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

Case No. 1325-A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES,
a Corporation,

Defendant.

Demurrer [in Bill of Exceptions].

Comes now the above-named defendant and demurs to the complaint of the plaintiff herein, and for cause of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That the act of the Alaska Legislature, approved April 22, 1915, referred to in the complaint and upon which the alleged liability of the defendant [19] is based, is invalid and void.

III.

That the act of the Alaska legislature approved April 22, 1915, referred to in the complaint, is in conflict with the Organic Act, the Laws of the United States and the Constitution of the United States, and is such that the territorial legislature did not possess the power and authority under the Organic Act to enact the same.

IV.

That the tax attempted to be laid by the act referred to in the complaint is not uniform upon the same class of subjects in this that an attempt is made to tax fish-traps and gill-nets, while seines are not taxed. Thereby imposing a burden on those fishing by means of traps and gill-nets, not imposed upon those fishing by means of seines, and the act is for that reason void to the extent that fish-traps are sought to be taxed.

V.

That the act referred to in the complaint is void for the reason that it is an attempt to lay and collect a tax without any reference to the value of the thing taxed, contrary to the provisions of the Organic Act in that regard.

VI.

That the tax imposed by the act, referred to in the complaint, is in fact a specific tax on property, and as such is levied without any reference [20] to the value of the property sought to be taxed, to wit, the fish-traps, contrary to the provisions of the Organic Act in that regard.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant.

That thereafter and on the 11th day of August, A. D., 1915, this cause came on regularly for hearing upon the demurrer so filed to the complaint, both parties being represented by counsel, and the matter having been fully argued and presented to the Court, the Court overruled said demurrer, to which ruling and order of the Court the defendant, by counsel,

then and there excepted, which exception was then and there allowed by the Court.

BE IT FURTHER REMEMBERED that thereafter the defendant filed its answer, to which a reply was duly filed by the plaintiff, whereupon the cause being at issue upon a question of fact, the parties duly and regularly by a stipulation in writing waived a jury, and thereupon the parties duly and regularly entered into a stipulation as to all the facts in the case, which stipulation is in words and figures as follows:

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1325-A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES,

a Corporation,

Defendant.

Stipulation [of Facts].

It is hereby stipulated and agreed by and between the plaintiff and defendant, by their respective [21] counsel, that this case shall be tried upon the following agreed facts:

I.

The defendant, The Alaska Pacific Fisheries, is a corporation duly incorporated and owning property and doing business in the Territory of Alaska.

II.

The said defendant is the owner of 19 fish-traps situate within the waters of Southeastern Alaska, which said traps and each and all of them it operated during the fishing season of 1915, to wit, during the months of June, July and August, taking fish therein.

III.

That none of the fish taken by the defendant in any one of its said fish-traps operated by it as afore-said, was sold by the defendant prior to being canned, but all the fish so caught were utilized by the defendant in connection with the operation of certain canning plants also owned by it in which said fish were canned and thereafter sold as canned salmon, and the defendant has not otherwise engaged in the fish-trap business.

IV.

That some of the canneries in the Territory of Alaska are so situate that because of natural conditions they are obliged to supply the fish canned by resorting to the use of fish-traps, while others are so situate because of natural conditions that the fish can be supplied in no other practical manner except by the use of gill-nets, while still others are so situate that the fish cannot be supplied except by the use of seines; that the canneries of the defendant are so situate that seines cannot be practically used in connection with the catching of the fish canned or in connection with the furnishing of the fish supplied for its canneries, but it is obliged to resort to the use of fish-traps for that purpose.

V.

The defendant has complied with all the provisions of chapter 3, title 7, of the Compiled Laws of the Territory of Alaska relating to fish and fisheries including the provisions of sections 259 to 275-A inclusive, and has paid the license tax provided for by said sections. [22]

VI.

The defendant has not paid the tax sued for in this action for 1915, or any part thereof.

VII.

The second session of the legislature which passed the act which forms the basis of this action, to wit, chapter 76, Session Laws of Alaska, 1915, convened on the 1st day of March, 1915, at 12 o'clock noon; that on the 29th day of April, 1915, said legislature adjourned, *sine die*, at 12 o'clock midnight according to the official time-pieces of said legislature, that is to say, the clocks hanging in the halls of the two Houses of the legislature were stopped or turned back by the sergeant-at-arms just prior to the hour of 12 o'clock midnight of April 29th, 1915, and thereafter between the hours of 3 and 4 o'clock A. M., sun time, of April 30th, 1915, while the clocks in said halls of the legislature still indicated prior to midnight, being stopped or turned back as aforesaid, the said act, namely chapter 76 of the Session Laws of Alaska, 1915, was finally passed by both Houses of the legislature and approved by the Governor and was enrolled and filed in the office of the Secretary of State for the Territory as it now appears in the printed volume of Session Laws of Alaska, 1915,

chapter 76; that the Governor of the Territory of Alaska did not call an extra session to pass said act.

VIII.

Some of the said traps of defendant are worth upwards of \$10,000 and some are worth not to exceed \$1,000.

IX.

It is further stipulated that upon the filing hereof the amended complaint shall be withdrawn; that a real controversy in good faith exists between the Territory and the Defendant, as to the meaning, scope and validity of said chapter 76, and this agreement as to the facts is made for the purpose of settling said controversy without the necessity, trouble and expense of introducing evidence; that the Territory waives all claim for penalties provided in said law, and only asks judgment for the amount of the tax, and legal interest from July 1, 1915.

The above and foregoing stipulation of facts are subject to objection from either party as to their incompetency, irrelevancy or immateriality the same as might be imposed on the trial [23] to evidence tending to prove such facts.

The parties make the following legal contentions respectively:

It is contended by the plaintiff that the said chapter 76, of the Session Laws of 1915, is a valid law and that thereunder the plaintiff is entitled to have and recover of and from the defendant the sum of \$1,900 with 8 per cent interest thereon from and after July 1, 1915.

It is contended on the part of the defendant that

it is not indebted to the plaintiff in any sum whatsoever, for the reason, first, that it does not come within the provisions of chapter 76 of the Session Laws of 1915, and second, because the said last-mentioned act, and especially those provisions relied upon as the basis of this action, is and are void and invalid for the reason referred to in the answer herein, as well as for other reasons not specifically in said answer set forth.

J. H. COBB,
Chief Counsel for the Territory of Alaska.
HELLENTHAL & HELLENTHAL,
Attorneys for Defendant.

Said stipulation having been filed and presented to the Court, it was further agreed:

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1325-A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES COMPANY, a
Corporation,

Defendant.

Amendment to Stipulation [of Facts].

The parties hereto agree that the stipulation heretofore filed herein and on which this case is to be tried shall be, and the same is hereby, amended by adding thereto the following clause:

“If the Court shall find, under the law, that judgment should go for plaintiff, said judgment shall be for the sum of \$1,900, with interest thereon [24] from July 1, 1915; from which judgment a writ of error or appeal may be prosecuted as provided by law.”

Dated this 20th day of November, 1915.

J. H. COBB,

Attorney for Plaintiff.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant.

[Conclusions of Law Requested by Defendant.]

Whereupon, the Court having adopted the facts as stipulated as the findings of the Court, the defendant asked the Court to conclude therefrom as a matter of law, as follows:

“Conclusion of Law No. 1, as Requested by Defendant.

That the act of the Territorial Legislature of the Territory of Alaska entitled, ‘An Act to establish a system of taxation, create revenue, and provide for the collection thereof for the Territory of Alaska and for other purposes, and to amend an act entitled, “An act to establish a system of taxation, create revenue, and provide for the collection thereof for the Territory of Alaska and for other purposes, approved May 1, 1913, and declaring an emergency;” which said act was approved May 29, 1915, and forms the basis of this action is inoperative, invalid and void, as far as it relates to the facts in this case.” which said conclusion of law the Court then and

there refused to adopt, then and there refusing to so conclude, to which ruling and order of the Court the defendant, by counsel, then and there excepted on the ground that said act of the territorial legislature referred to in said conclusion of law No. 1, which forms the basis of this action, is invalid and void, especially in so far as it relates to the facts in this case, for the reasons, among [25] others, enumerated in the answer herein, said act being in conflict with the provisions of the Organic Act of the Territory of Alaska, as well as the provisions of the Constitution of the United States for the reasons set out in detail in the answer, which are to be regarded as incorporated herein; and it is further invalid and void as having been passed and enacted by the territorial legislature of Alaska without authority and in violation of the limits imposed upon the authority of the legislature by the Organic Act of the Territory, providing for the legislature and defining its powers, and further for the reason that said pretended act was passed by the legislature after the period during which legislation could be enacted by the said legislature had expired and at a time when said legislature was not legally in session and had no legal status or existence, which said exception so taken by the defendant was then and there allowed by the Court.

Then and there also the Court having adopted the facts as stipulated by the parties as its findings as aforesaid, the defendant asked the Court to adopt as its conclusion of law, and conclude as a matter of law from the facts stipulated and found, as follows:

“Conclusion of Law No. 2, Requested by Defendant.

That the defendant is not indebted to the plaintiff in any sum whatsoever, and that the complaint should be dismissed and the plaintiff recover nothing by reason thereof.”

which said request made by the defendant was then and there denied by the Court, and the Court refused to adopt said conclusion or to conclude from the facts found as requested, [26] to which ruling and order of the Court the defendant, by counsel, then and there excepted on the ground and for the reason that under the facts as stipulated to by the parties and as found by the Court, it appears that the act of the legislature, which forms the basis of the action, the title of which is set out in full in conclusion of law No. 1 as proposed by defendant, is void and invalid for the reasons stated in the exception taken to the refusal of the Court to adopt said conclusion of law No. 1, as well as for the reasons stated in the answer herein and other reasons not specifically set forth, and said exception is taken on the further ground that even though said act were valid and in force it is shown conclusively by the facts as stipulated to by the parties and as found by the Court that the defendant is not liable to the plaintiff in any sum whatsoever by reason thereof, it being shown that the defendant is not engaged in any business or occupation taxed or licensed by said act and is not engaged in the business of “fish-traps,” and is not liable for any taxes or license fees due under the provisions of said act, which said exception was then and there allowed by the Court.

And the Court having found the facts as stipulated as aforesaid, the defendant then and there further asked the Court to adopt as its conclusion, and conclude as a matter of law as follows: [27]

“Conclusion of Law No. 3, as Requested by Defendant.

That the defendant should have judgment against the plaintiff for its costs and disbursements in this behalf incurred.”

which said request so made by the defendant the Court then and there denied, to which ruling and order of the Court the defendant, by counsel, then and there excepted on the ground that under the facts as stipulated and as found by the Court the plaintiff is not entitled to recover from the defendant, but defendant is shown to be entitled to a judgment for costs against the plaintiff, the defendant being not liable to the plaintiff in the sum sued for or any other sum whatsoever, which said exception was then and there allowed by the Court.

[Findings and Conclusion of Law]

Whereupon, the Court having adopted the facts as stipulated to by the parties as the findings of the Court concluded as a matter of law as follows:

“And from the foregoing facts and stipulation the Court concludes as a matter of law that the plaintiff is entitled to judgment for the sum of \$1,963 and costs.”

to which said ruling and order of the Court in adopting the conclusion of law so adopted and concluding as a matter of law from the facts found as above set forth, the defendant, by counsel, then and there

objected on the ground that the act of the legislature of the Territory of Alaska, entitled "An act to establish a system of taxation, create revenue, and provide for the collection thereof for the Territory of Alaska and for other purposes, and to amend an act entitled, 'An act to establish a system of taxation, [28] create revenue and provide for the collection thereof for the Territory of Alaska and for other purposes, approved May 1, 1913, and declaring an emergency' " the same being chapter 76 of the Session Laws of the Session of the year 1915, and being the law which forms the basis of this action, is void and invalid so far as it affects the defendant in this action and in so far as it relates to the cause of action sued upon, for the several reasons, among others set forth in detail in the answer herein and for the reason that the same is in conflict with the Organic Act of the Territory and the Constitution of the United States; that in passing and adopting the same the legislature acted beyond its authority as defined and limited in the Organic Act of the Territory creating the legislature and defining its powers; for the further reason that the pretended act above referred to was passed and adopted by the legislature after the same had, as a matter of law, adjourned and while said legislature had no existence as a legislative body, and no authority to pass or enact laws; said conclusion adopted by the Court is objected and excepted to for the further reason that even though the act of the legislature above referred to, and which is the basis of this action, should be construed as valid, the facts as stipulated to and as

found by the Court conclusively show that the defendant is not liable to the plaintiff for taxes or license fees thereunder; that the matters and things done by the defendant and charged against it, as stipulated to by the parties, and as found by the Court, conclusively show that the defendant did not do or perform any act or engaged in any [29] business or occupation that required it to pay the license fee or tax sued for, or any part thereof, or make it liable for the same, or any part thereof, which said objection so made by the defendant was then and there overruled by the Court and the Court adopted as its conclusion, the conclusion of law last above referred to, to which said objection was made, to which ruling and order of the Court the defendant, by counsel, then and there excepted on each of the grounds and for all the reasons stated in the objection to the making of said conclusion as above narrated, which exception was then and there duly and regularly allowed by the Court.

And the defendant having asked the Court to settle allow and sign the above and foregoing bill of exceptions and order the same made a part of the record herein,

**[Order Settling and Allowing Bill of Exceptions,
etc.]**

NOW, THEREFORE, it is ORDERED by the Court that the above and foregoing bill of exceptions be settled, signed and allowed as a true, full and correct bill of exceptions herein, the same having been duly presented within the time allowed therefor by the Court, and the Court hereby certifies that the

foregoing bill of exceptions contains a record of all the proceedings had herein; that no evidence was offered or received in said cause; but that the same was tried upon the facts as stipulated to by the parties, and that the foregoing bill of exceptions contains all the facts so stipulated to and all the proceedings had in this cause; it is accordingly ORDERED that the above and foregoing bill of exceptions be made a part of the record herein.

Done in open court this 9th day of December, 1915.

ROBERT W. JENNINGS,

District Judge. [30]

O K. COBB.

Filed in the District Court, District of Alaska, First Division. Dec. 9, 1915. J. W. Bell, Clerk. By ———, Deputy.

[Endorsed]: Original. No. 1325—A. In the District Court for the Territory of Alaska, Division No. 1. Territory of Alaska, Plaintiff, vs. Alaska Pacific Fisheries, a Corporation, Defendant. Bill of Exceptions. Hellenthal & Hellenthal, Attorneys for Alaska Pacific Fisheries. Office; Juneau, Alaska. [31]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

Case No. 1325—A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

*United States Circuit Court of Appeals for the
Ninth Circuit, Holden at San Francisco.*

Case No. 1325-A.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error,

Petition for Writ of Error and Allowance Thereof.
To the Honorable ROBERT W. JENNINGS, Judge
of the District Court for the Territory of
Alaska, Division Number One:

Now comes the above-named Alaska Pacific Fisheries, a corporation, the plaintiff in error herein, by its attorneys, Hellenthal & Hellenthal, and complains that in the record and proceedings had in the District Court for the Territory of Alaska, Division Number One, in the case of the Territory of Alaska, plaintiff, and defendant in error, against the Alaska Pacific Fisheries, defendant, and plaintiff in error, and also in the rendition of the judgment in said cause in the District Court for the Territory of Alaska, Division Number One, against the Alaska Pacific Fisheries on the 2d day [32] of December, 1915, wherein the District Court for the Territory of Alaska adjudged the defendant, the Alaska Pacific Fisheries, to be indebted to the plaintiff, the Territory of Alaska, in the sum of \$1,963, and wherein the plaintiff, the Territory of Alaska, was given judgment against the defendant, the Alaska

Pacific Fisheries, for the sum of \$1,963 and costs, taxed at \$——, manifest error hath happened to the great damage of said Alaska Pacific Fisheries, as will more fully appear from the assignment of errors filed herewith.

WHEREFORE the Alaska Pacific Fisheries prays for the allowance of a writ of error, and for an order fixing the amount of the bond in said cause, and for such other orders and processes as may cause the said errors to be corrected by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 9th day of December, A. D., 1915.

HELLENTHAL & HELLENTHAL,

Attorneys for Alaska Pacific Fisheries.

The above petition for writ of error is allowed and the bond fixed at Two Thousand Five Hundred (\$2,500) Dollars, to be approved by the clerk of the above-entitled court.

Dated this 9th day of December, 1915.

ROBERT W. JENNINGS,

Judge. [33]

Filed in the District Court, District of Alaska, First Division. Dec. 9, 1915. J. W. Bell, Clerk. By ———, Deputy.

[Endorsed]: Original. No. 1326-A. In the District Court for the Territory of Alaska Division No. 1. The Territory of Alaska, Plaintiff, vs. Alaska Pacific Fisheries, a Corporation, Defendant. Petition for Writ of Error and Allowance Thereof. Hellenthal & Hellenthal, Attorneys for Alaska Pacific Fisheries. Office: Juneau, Alaska. [34]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

*United Circuit Court of Appeals for the Ninth Cir-
cuit, Holden at San Francisco, California.*

Case No. 1325.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Assignment of Errors.

Comes now the Alaska Pacific Fisheries, the plaintiff in error and assigns the following errors committed by the Court in connection with the trial and rendition of judgment herein, the errors so assigned being the errors which the plaintiff in error intends to urge before the United States Circuit Court of Appeals for the Ninth Circuit, and are the errors relied upon for a reversal of the judgment herein:

FIRST ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One erred in overruling the defendant's demurrer to the plaintiff's complaint, which said demurrer was and is in words and figures as follows: [35]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

Case No. 1325-A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

DEMURRER.

Comes now the above-named defendant and demurs to the complaint of the plaintiff herein, and for cause of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That the act of the Alaska legislature, approved April 22, 1915, referred to in the complaint and upon which the alleged liability of the defendant is based, is invalid and void.

III.

That the act of the Alaska legislature approved April 22, 1915, referred to in the complaint, is in conflict with the Organic Act, the Laws of the United States and the Constitution of the United States, and is such that the Territorial Legislature did not possess the power and authority under the Organic Act to enact the same.

IV.

That the tax attempted to be laid by the act re-

ferred to in the complaint is not uniform upon the same class of subjects in this that an attempt is made to tax fish-traps and gill-nets while seines are not taxed. Thereby imposing a burden on those fishing by means of traps and gill-nets, not imposed upon those fishing by means of seines, and the act is for that reason void to the extent that fish-traps are sought to be taxed.

V.

That the act referred to in the complaint is void for the reason that it is an attempt to lay and collect a tax without any reference to the value of the thing taxed, contrary to the provisions of the Organic Act in that regard.

VI.

That the tax imposed by the act, referred to [36] in the complaint, is in fact a specific tax on property, and as such is levied without any reference to the value of the property sought to be taxed, to wit, the fish-traps, contrary to the provisions of the Organic Act in that regard.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant.

SECOND ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in failing and refusing at the request of the plaintiff in error, The Alaska Pacific Fisheries, to conclude as a matter of law from the facts found and to adopt as its conclusion of law conclusion of law No. 1 as requested by the defendant, which is in words and figures as follows:

“CONCLUSION OF LAW NO. 1, AS REQUESTED
BY DEFENDANT.

That the act of the territorial legislature of the Territory of Alaska entitled, ‘An act to establish a system of taxation, create revenue, and provide for the collection thereof for the Territory of Alaska, and for other purposes, and to amend an act entitled, “An act to establish a system of taxation, create revenue and provide for the collection thereof for the Territory of Alaska and for other purposes, approved May 1, 1913, and declaring an emergency,” ’ which said act was approved May 29, 1915, and forms the basis of this action is inoperative, invalid and void, as far as it relates to the facts in this case.”

THIRD ERROR ASSIGNED.

That the District Court, for the Territory of Alaska, Division Number One, erred in failing and refusing at the request of the plaintiff in error, the Alaska Pacific Fisheries, to conclude as a matter of law from the facts [37] found and to adopt as its conclusion of law conclusion of Law No. 2 as requested by the defendant, which is in words and figures as follows:

“CONCLUSION OF LAW NO. 2, AS REQUESTED
BY DEFENDANT.

That the defendant is not indebted to the plaintiff in any sum whatsoever, and that the complaint should be dismissed and the plaintiff recover nothing by reason thereof.”

FOURTH ERROR ASSIGNED.

That the District Court, for the Territory of Alaska, Division Number One, erred in failing and refusing at the request of the plaintiff in error, The Alaska Pacific Fisheries, to conclude as a matter of law from the facts found and to adopt as its conclusion of law conclusion of law No. 3, as requested by the defendant, which is in words and figures as follows:

“CONCLUSION OF LAW NO. 3, AS REQUESTED
BY DEFENDANT.

That the defendant should have judgment against the plaintiff for its costs and disbursements in this behalf incurred.”

FIFTH ERROR ASSIGNED.

That the District Court, for the Territory of Alaska, Division Number One, erred in adopting as its conclusion of law and in concluding from the facts stipulated and found, as follows:

“And from the foregoing facts and stipulation the Court concludes as a matter of law that the plaintiff is entitled to judgment for the sum of \$1,963 and costs.” [38]

SIXTH ERROR ASSIGNED.

That the District Court, for the Territory of Alaska, Division Number One, erred in rendering judgment herein for the plaintiff in the sum specified or in any sum whatsoever.

HELLENTHAL & HELLENTHAL,
Attorneys for Alaska Pacific Fisheries.

Due service by copy of the foregoing admitted this
 — day of December, 1915.

Chief Counsel for Territory of Alaska.

Filed in the District Court, District of Alaska,
 First Division. Dec. 9, 1915. J. W. Bell, Clerk.
 By ———, Deputy.

[Endorsed]: Original No. 1325-A. In the Dis-
 trict Court for the Territory of Alaska, Division No.
 1. Territory of Alaska, Plaintiff vs. Alaska Pacific
 Fisheries, a corporation, Defendant. Assignment
 of Errors. Hellenthal & Hellenthal, Attorneys for
 Alaska Pacific Fisheries. Office: Juneau, Alaska.
 [39]

*In the District Court for the Territory of Alaska,
 Division Number One, at Juneau.*

Case No. 1325-A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES,

Defendant.

*United States Circuit Court of Appeals for the
 Ninth Circuit, Holden at San Francisco.*

Case No. 1325-A.

ALASKA PACIFIC FISHERIES, a Corporation,

Plaintiff in Error,

vs.

TERRITORY OF ALASKA,

Defendant in Error.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS that We, the Alaska Pacific Fisheries, a corporation, as principal, and B. M. Behrends, as surety, are held and firmly bound unto the above-named Territory of Alaska, in the just and full sum of two thousand five hundred (\$2,500) dollars to be paid to the said Territory of Alaska, its attorneys or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 9th day of December, A. D. 1915.

WHEREAS, lately in the District Court for the Territory of Alaska, Division Number One, in an action therein pending between the Territory of Alaska, as plaintiff, and the Alaska Pacific Fisheries as defendant, a judgment was [40] rendered against the said Alaska Pacific Fisheries for the sum of \$1,963 and costs, and the said Alaska Pacific Fisheries having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid action and the citation directed to the said Territory of Alaska, citing and admonishing it to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, State of California, within thirty days from the date of approval of this bond,

Now the condition of the above obligation is such that if the said Alaska Pacific Fisheries shall prose-

cute said writ of error to effect and answer all damages and costs if it fail to make its said plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

ALASKA PACIFIC FISHERIES.

By J. A. HELLENTHAL,

Its Attorneys, Principal.

B. M. BEHREND, S,

Surety.

Signed, sealed and delivered in the presence of:

M. CASEY.

GUY McNAUGHTON.

The above and foregoing supersedeas and cost bond is hereby duly approved, not only as to form, but also as to the surety thereon, this 9th day of December, 1915.

ROBERT W. JENNINGS,

Judge of the District Court for the Territory of Alaska, Division Number One.

Filed in the District Court, District of Alaska, First Division. Dec. 9, 1915. J. W. Bell, Clerk.

By ————— Deputy.

[Endorsed]: Original No. ——. In the District Court for the Territory of Alaska, Division No. 1. Territory of Alaska, Plaintiff vs. Alaska Pacific Fisheries, a Corporation, Defendant. Bond on Writ of Error. Hellenthal & Hellenthal, Attorneys for ———. Office: Juneau, Alaska. [41]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

*United States Circuit Court of Appeals for the Ninth
Circuit Holden at San Francisco.*

Case No. 1325—A.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error.

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Writ of Error.

United States of America,—ss.

The President of the United States of America to
the Honorable ROBERT W. JENNINGS, Judge
of the District Court for the Territory of Alaska,
Division Number One, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea, which is in
said District Court, Division Number One thereof,
before you, between the territory of Alaska, as
plaintiff, and the Alaska Pacific Fisheries, a corpora-
tion, as defendant, a manifest error hath lhappened
to the great prejudice and damage of the said Alaska
Pacific Fisheries as set forth and appears by the
petition herein,

We, being willing that error, if any hath happened,
should be duly corrected and full and speedy jus-
tice done to the parties aforesaid in this behalf, do
command you, if judgment be therein given, that
then under your seal distinctly and openly you send

the records and proceedings aforesaid with all things concerning the same to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, [42] in the city of San Francisco, in the State of California, together with this writ, so as to have the same at said place and said circuit on or before thirty days from the date hereof that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 9th day of December, A. D. 1915.

Attest my hand and the seal of the District Court for the Territory of Alaska, Division Number One, at the clerk's office at Juneau on the day and year last above written.

[Seal]

J. W. BELL,

Clerk of the District Court for the Territory of Alaska, Division No. 1.

Allowed this 9th day of December, A. D. 1915.

ROBERT W. JENNINGS,

Judge.

Due service of the within and foregoing writ of error is acknowledged this 9th day of December, A. D., 1915.

J. H. COBB,

Chief Counsel for the Territory of Alaska. [43]

[Endorsed]: Original. No. 1325-A. In the District Court, for the Territory of Alaska, Division

No. 1. The Territory of Alaska, Plaintiff, vs. Alaska Fisheries, a Corporation, Defendant. Writ of Error. Filed in the District Court, District of Alaska, First Division. Dec. 9, 1915. J. W. Bell, Clerk. By ————— Deputy. [44]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

Case No. 1325-A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

*United States Circuit Court of Appeals for the Ninth
Circuit Holden at San Francisco.*

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,

Defendant in Error.

No. 1325-A.

Citation on Writ of Error.

The President of the United States to the Territory of Alaska, the Above-named Plaintiff, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, within thirty

(30) days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Division Number One, wherein the Alaska Pacific Fisheries, a corporation, is the plaintiff in error and you, the said Territory of Alaska, are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should [45] be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 9th day of December, A. D., 1915, and of the Independence of the United States the 139th.

ROBERT W. JENNINGS,
Judge.

Due and personal service of the foregoing citation is hereby admitted on behalf of the Territory of Alaska, defendant in error, this 9th day of December A. D., 1915.

J. H. COBB,
Attorney for said Defendant in Error. [46]

[Endorsed]: Original. No. 1325-A. In the District Court for the Territory of Alaska, Division No. 1. The Territory of Alaska, Plaintiff, vs. Alaska Pacific Fisheries, a Corporation, Defendant. Citation on Writ of Error. Filed in the District Court, District of Alaska, First Division. Dec. 9, 1915. J. W. Bell, Clerk. By —————, Deputy. [47]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 1325-A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

No. 1326-A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,
Defendant.

Memorandum Opinion on Demurrer. [48]

By act approved April 29, 1915, the legislature of Alaska provided as follows:

“Section 1. That any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in the Territory of Alaska, shall apply for and obtain a license and pay for said license, for the respective lines of business as follows:

.
8. Fish-traps, fixed or floating, \$100 per annum.
So-called dummy traps included.”

.
It also provided in Section 2 that
“Every person, firm or corporation desiring

to engage in any of the lines of business specified in section 1, shall first apply to and obtain from the territorial treasurer a license. If the tax for the license applied for is a fixed sum, the amount of such license tax shall accompany the application.”

Said section 2 further provided for the bringing of a suit, either civil or criminal, to collect the license, and section 4 of the said act provided:

“Special remedies provided by this act . . . shall not be deemed exclusive, and any appropriate remedy, either civil or criminal or both, may be invoked by the territory in the collection of all taxes; and in civil actions the same penalties may be collected as are herein provided in criminal actions.”

Under the provisions of this act of the legislature, the Territory of Alaska brought suit against the defendant, alleging in the complaint—

“That during the month of June, 1915, and continuously up to the present time the defendant was engaged in and prosecuting and attempting to prosecute the business of fishing by means of fish-traps situate in the waters of Alaska, and that it has failed, neglected and refused to pay the license tax, or any part thereof, provided for by said act of the legislature. Wherefore the territory asks for judgment for the amount of the license tax due.”

To this a demurrer has been interposed, on the ground that the said complaint does not state facts sufficient to constitute a cause of action; and in sup-

port of the demurrer the point is raised that the legislature had no power to impose such a tax, for the reasons— [49]

1. Congress has reserved to itself the exclusive control of the fish and game in Alaska.

2. The said tax is in violation of section 9 of the Organic Act of the Territory (Act of June 26, 1906, aforesaid), which provides:

“All taxes shall be uniform upon the same class of subjects, and shall be levied and collected under general laws, and the assessment shall be according to the actual value thereof.”

As to the first point raised in support of the demurrer, to wit: “Congress has reserved to itself the exclusive control of the fish and game of Alaska”; it is urged that by the act approved June 26, 1906, (34 Stat. L. 478) Congress provided:

“That every person, company or corporation carrying on the business of canning, curing or preserving fish, or manufacturing fish products within the Territory known as Alaska . . . shall, in lieu of all other license fees and taxes therefor and thereon, pay a license tax on their said business and output as follows:

Canned Salmon, 4¢ per case;

Pickled Salmon, 10¢ per barrel;

Salt Salmon in bulk, 5¢ per 100 pounds;

Fish Oil, 10¢ per barrel;

Fertilizer, 20¢ per ton;

and that the Organic Act of the territory, passed six years after the act of 1906, and which provides:

“That the power of the legislature should not extend to the fish laws . . . or to the laws

of the United States providing for taxes on business and trade; provided, further, that this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses” (C. L. 1913; Sec. 421.)

should be taken to mean that the legislature is not prohibited from imposing other and additional licenses or taxes “on other kinds of industries and on other kinds of business or trade not covered by the act of 1906.”

The reasoning advanced why the Court should so hold is not convincing on the contrary, as the Organic Act is the latest expression of the legislative will on the subject, it would seem that it must be taken as repealing that part of the former act which is in conflict therewith, to wit: “shall in lieu of all other license fees and taxes.” For the Court to hold that the [50] later act does not repeal the former act to the extent indicated, it would be compelled to read into the later act some words which are not there, to wit: “On other kinds of industries and on other kinds of business or trade not covered by the act of 1906.” This would not be justified by any canon of construction. The very position of the proviso in the statute shows what Congress had in mind, to wit, that in imposing other and additional licenses or taxes the legislature should not be fettered by anything contained in the act of 1906. It is not apparent that there is any need of construction, for the language is plain and unambiguous. A reference to the debates in Congress when the bill was before it would clear up any ambiguity if, indeed, any such existed.

The bill came up for argument on Wednesday, the 24th of April, 1912. In its original form the proviso was as follows:

“That the authority herein granted to the legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal or other general laws of the United States”;

and nothing was there said about the game or the fish. Whereupon the following occurred:

Mr. WILLIS.—Mr. Chairman, I offer the following amendment, which I send to the desk and ask to have read.

The Clerk read as follows:

Line 9, page 23, after the word “States,” insert the words “or to the game laws of the United States applicable to Alaska.”

Mr. MANN.—Why not make it game and fish laws?

Mr. WICKERSHAM.—Mr. Chairman, I think the fish laws ought to be left alone.

Mr. MANN.—Why not make it game and fish laws, so that they cannot repeal the fish laws? They can pass new fish laws.

Mr. WILLIS.—Mr. Chairman, I will accept that amendment, and ask unanimous consent that it be so modified and reported as modified.

The CHAIRMAN. — Without objection, the amendment will be so modified, and the clerk will report the amendment as modified.

The Clerk read as follows:

Line 9, page 23, after the word “States,” insert

the words “or to the game and fish laws of the United States applicable to Alaska.”

Mr. WICKERSHAM.—Mr. Chairman, I do not think that the word “fish” ought to be in there. I think the fisheries in Alaska need protection. They belong to the people of the State or to the Territory, and they do not belong to the Government of the United States. They are not now being protected. They are not now being conserved, and if this legislature will do something toward conserving, and protecting the fish it ought to be allowed [51] to do it. This simply bars the legislature from protecting the fisheries in that Territory, and it ought not to be in the bill.

Mr. MANN.—The gentleman will notice this provision does not apply to passing laws, but only to the repealing of laws.

Mr. WILLIS.—It seems to me the observation of the gentleman from Illinois answers the objection of the gentleman from Alaska. It simply provides, if it shall be adopted, that the legislature of the Territory of Alaska shall not have the power to alter, amend or repeal the United States fish or game laws now in force in the Territory. It does not take away from the legislature the power to pass additional laws of that character. It seems to me that meets the objection.

Mr. WICKERSHAM.—I think they ought to be allowed to amend them.

Mr. WILLIS.—We have a Federal fish law in Alaska. The gentleman is not objecting to that.

Mr. WICKERSHAM.—No.

Mr. WILLIS.—That is all this amendment pro-

vides—that the legislature shall not have the power to amend the present fish or game laws.

Mr. WICKERSHAM.—What does that mean?

Mr. WILLIS.—It means that the present law shall stand.

Mr. FLOOD of Virginia. — Suppose Congress passes a law revising and extending the fish laws there?

Mr. WILLIS.—Well, undoubtedly that will be the paramount law of Alaska.

Mr. FLOOD of Virginia.—What will be the effect of the gentleman's amendment?

Mr. WILLIS.—The effect of this amendment will be, as I understand it, simply to take away from the legislature of Alaska the power to amend the fish or game laws now in effect in Alaska.

Mr. FLOOD of Virginia.—It would not have the effect to take away from the legislature of Alaska the power to amend the fish laws we hereafter pass?

Mr. WILLIS.—No; I do not think it would, as I have worded it, although I did not have that in mind when I drafted the amendment.

Mr. MANN.—They would not have that power?

Mr. WILLIS.—They would not have that power now.

Mr. FLOOD of Virginia.—The gentleman is aware of the fact there is a proposition to revise the fish laws?

Mr. WILLIS.—Yes; I think the bill is a good one and ought to pass.

Mr. FLOOD of Virginia.—And will in all probability become the law.

Mr. WILLIS.—It seems to me this meets the objection that has been raised in a perfectly fair manner, and I think it is a fair objection, but I do not believe the legislature ought to repeal the present game or fish laws.

Mr. MANN.—We have endeavored to provide in a way for the conservation of the fisheries and game up there. We ought not to permit those laws to be repealed, but if they want to make them more stringent, and probably do, they ought to have that right.

Mr. FLOOD of Virginia.—I do not think the amendment means anything, but if it will please anybody to put it in, why, let it go.

Mr. WICKERSHAM.—I shall withdraw my objection.

The question was taken, and the amendment was agreed to.

(Vol. 48, Part 6, page 5288, Congressional Record, 62d Congress, Second Session.)

This, however, did not seem to be specific enough for the Senate for when the bill reached that body it was amended by having added to it this provision:
[52]

“Provided further that this provision shall not operate to prevent the legislature from imposing other and additional taxes and licenses.”

The House refused to agree to this and to several other amendments, and the committee on conference of the House reported, recommending that the House recede from its disagreement to this Senate amendment. The House did recede from said disagreement, and the Senate proviso was added to the bill.

This occurred on August 20, 1912, and the record of it is found in said Congressional Record at page —.

Thus it will be seen—

1. That there is on the face of the bill no expression of any such purpose as is contended for.

2. That no such purpose as is contended for was in the minds of the legislators when the bill passed, but on the contrary what was in their minds was that the legislature should have the power to levy additional taxes on the fish and the game business and on other businesses.

As to the second point raised in support of the demurrer, to wit: “The said tax is in violation of section 9 of the Organic Act of the Territory”;

A reference to the legislation and to one Supreme Court decision on the subject of the taxation of the fisheries business in Alaska may throw some light on the subject.

By the criminal code of Alaska, adopted March 3, 1899, (C. L. 1913, Sec. 2569) Congress provided:

“That any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska shall first apply for and obtain a license so to do from a District Court or a subdivision thereof in said District, and pay for said license for the respective lines of business and trade as follows, to wit:

.

Fisheries: Salmon Canneries, 4¢ per case;
Salmon Salteries, 10¢ per barrel;
Fish Oil Works, 10¢ per barrel;
Fertilizer Works, 20¢ per ton."

The point was raised that this act was in violation of section 8, article 1 of the Constitution of the United States, which reads: [53]

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, . . . but all duties, imposts and excises shall be uniform throughout the United States;"

and that said act, insomuch as it directed the money to be paid into the treasury of the United States could not be sustained. The point was passed upon in the case of *Binns V. United States*, (194 U. S. 486, decided May 31, 1904), and Justice Brewer, at page 491 says:

"We shall assume that the purpose of the license fees required by section 460 is the collection of revenue, and that the license fees are excises within the constitutional sense of the terms. Nevertheless we are of opinion that they are to be regarded as local taxes imposed for the purpose of raising funds to support the administration of local government in Alaska.

It must be remembered that Congress, in the government of the territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories. We are ac-

customed to that generally adopted for the territories, of a *quasi* State Government, with executive, legislative and judicial officers, and a legislature endowed with the power of local taxation and local expenditures, but Congress is not limited to this form. In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a territory or transfer the power of such legislation to a legislature elected by the citizens of the territory. It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District. It may entrust to them a large volume of legislative power, or it may by direct legislation create the whole body of statutory law applicable thereto. For Alaska, Congress has established a government of a different form. It has provided no legislative body but only executive and judicial officers. It has enacted a penal and civil code. Having created no legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that territory. Instead of raising revenue by direct taxation upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes.”

And later on in the decision the learned Justice quotes the following from volume 32 Congressional Record, part 3, page 2235, to wit:

“ ‘The committee on territories have thoroughly investigated the conditions of affairs in Alaska and have prepared certain licenses which in their judgment will create a revenue sufficient to defray all the expenses of the government of the Territory of Alaska . . . They are licenses peculiar to the condition of affairs in the Territory of Alaska on certain lines of goods, articles of commerce, etc., which, in the judgment of the committee, should bear a license, inasmuch as there is no taxation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the committee on territories, after consultation with prominent citizens of the Territory of Alaska, including the Governor and [54] several other officers, this code or list of licenses was prepared by the committee. It was prepared largely upon their suggestions and upon the information of the committee derived from conversing with them.’

While, of course, it would have simplified the matter and removed all doubt if the statute had provided that those taxes be paid directly to some local treasurer and by him disbursed in payment of territorial expenses, yet it seems to us it would be sacrificing substance to form to hold that the method pursued when the intent of Congress is obvious, is sufficient to invalidate the taxes.

In order to avoid any misapprehension we

may add that this opinion must not be extended to any case, if one should arise, in which it is apparent that Congress is, by some special system of license taxes, seeking to obtain from a territory of the United States revenue for the benefit of the nation as distinguished from that necessary for the support of the territorial government.”

Thus it will be seen that the license was declared to be a tax and was sustained as not being in contravention of the said Articles of the Constitution, on account of the fact that the money, although to be paid into the treasury of the United States, was to be used for the support of the territory—in other words, that it was a tax imposed on businesses in Alaska by Congress, the then legislative body for Alaska, for local purposes.

Then came the acts of Congress of March 30, 1906, and of March 24, 1912, *supra*.

Such being the state of Federal legislation on the subject of taxing the fishing industry in Alaska, the legislature of Alaska passed the act whose validity is here assailed.

We have seen by the Binns case that Congress when imposing a license tax system on businesses in Alaska, was not fettered by the constitutional prohibition as to uniformity. It must be conceded that Congress had plenary power over the territory—that is, that it could legislate on all rightful subjects of legislation not prohibited by the national constitution. This power it had, not so much from its constitutional power to make rules and regulations for

the government of the territory, as from its inherent power arising from the ownership of the *res*. Having this power, Congress certainly had the power to confer it upon the legislature. It is true that the powers of that legislature are limited by the act defining those powers and that in this respect a territorial legislature differs from State legislatures; that [55] is to say, the Organic Act of a territory if a grant of specific powers and not a reservation of specific powers.

Congress, when implanting this new jurisdiction in Alaska, expressly provided that the power of the Alaska legislature

“Shall extend to all rightful subjects of legislation not inconsistent with the laws of the United States, but it shall not, etc.”

Then follow exceptions too numerous to mention,—more than have obtained in the case of any other territory,—well nigh emasculating the original grant, and causing it to “speak the word of promise to the ear and break it to the hope.” However, of its pristine vigor there is left enough to justify the imposition of license taxes and property taxes. Such power finds its warrant in the principle that unless a power is forbidden to our legislature the latter possesses the power—“provided it be a rightful subject of legislation.” That is to say, Congress, ordaining for this territory an Organic Act, does a thing for the territory which in its nature but not in its extent, is similar, analogous, to what the people of a State do when they adopt a constitution for the State.

“The legislative power to be exercised by the territorial legislature is the legislative power of the territory, not that of the United States. Both states and territories, in a certain sense, derive their existence from the legislation of Congress, but the jurisdiction and authority exercised, either by a state or territory, is that of a state or territory, and not that of Congress. Territorial statutes have a distinct and well-defined character of their own. The people of a territory, when authorized to form a territorial government, are vested with a qualified sovereignty. Congress may limit their powers, and may annul their enactments, but, subject to these limitations, the territory is a government. Its laws, unless set aside by Congress or the courts, are the laws of the territory; they are not laws of the United States, within the ordinary meaning of those terms; certainly not in the sense that the acts of Congress, approved by the president, are laws of the United States.”

(16 Fed. 715.)

This being true, the inquiries are these:

(a.) When the legislature imposed this license tax, was it exercising power over a rightful subject of legislation? If it was not so exercising power, the enactment must fall; if, however, it was so exercising power, the enactment must stand, *unless* it violates some other provision of the constitution, (Organic Act.) [56]

That the power to raise revenue by levying a license tax on business pursuits is “a rightful subject of legislation” will hardly be denied.

25 Cyc. p. 599, Sec. 3, and cases cited in Note 16.

(b) Pursuing the argument, then: Such power, being a rightful subject of legislation, exists in the legislature of this Territory unless there is some provision in the Organic Act which negatives the power. If there is any such provision, where is it to be found?

Counsel for defendant affects to find it in that provision of the Organic Act which declares that "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the value thereof. No taxes shall be levied for territorial purposes in excess of one per centum upon the assessed valuation of the property therein in any one year."

If this uniformity requirement applied to anything except direct property taxes the argument might prevail—but that in fact it does apply exclusively to direct property taxes and to nothing else has been decided so often as to be beyond caval.

25 Cyc. p. 605–6, and cases cited.

"The constitutions of many of the states contain the requirement that taxation shall be equal and uniform, that all property in the state shall be taxed in proportion to its value, that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, or that the legislature shall provide for an equal and uniform rate of assessment and taxation; and in the face of such provisions a tax law which violates the

prescribed rule of equality and uniformity is invalid, although there is sufficient difference in the wording of the different provisions to account for some lack of uniformity in the decisions as to what constitutes a violation of their requirements. The requirement does not apply to every species of taxation, and does not restrict the legislature to the levying of taxes upon property alone. The restriction relates only to the rate or amount of taxation and its incidence upon taxable persons and property, and does not limit the legislature in regulating the mode of levying and collecting the taxes imposed, and it also relates only to property within the state, and neither the statutes of another state nor the action of its taxing officers can affect the question. In the absence of such a constitutional requirement it is not essential to the validity of taxation that it shall be equal and uniform, and in such a case a tax law cannot be declared unconstitutional merely because it operates unequally, unjustly, or oppressively. [57]

The requirement of equality and uniformity applies only to taxes in the proper sense of the word, levied with the object of raising revenue for general purposes, and not to such as are of an extraordinary and exceptional kind, or to local assessments for improvements levied upon property specially benefited thereby, or to other burdens, charges, or impositions which are not properly speaking taxes; and further,

such a constitutional provision is to be restricted to taxes on property, as distinguished from such as are levied on occupations, business, or franchises, and on inheritances and successions, and as distinguished also from exactions imposed in the exercise of the police power rather than that of taxation.

The principle of equality and uniformity does not require the equal taxation of all occupations or pursuits, nor prevent the legislature from taxing some kinds of business while leaving others exempt, or from classifying the various forms of business, but only that the burdens of taxation shall be imposed equally upon all persons pursuing the same avocation, or that if those following the same calling are divided into classes for the purposes of taxation, the basis of classification shall be reasonable and founded on a real distinction, and not merely arbitrary or capricious. To this extent also, and no further, the principle applies to license fees or taxes imposed under the police power or for the better regulation of occupations supposed to have an important public aspect.”

(37 Cyc. p. 729-33.)

It is argued that the legislature has only such powers of taxation as is conferred by section 9 of the Organic Act—but this is a mistake. It is true that that section expresses the limit of its powers as to direct property taxation, but it is elsewhere granted the express power to raise revenue by license taxes (C. L. 1913, S. 410), and as a matter of

fact that is the only method of taxation which the Legislature has adopted.

It is said that the system of taxation adopted is the exercise of special and not general legislation—This position is untenable. See *Codlin v. Kohlhausen*, 58 P. R. 499.

It is said that there has been no assessment, but

“The cardinal rule in taxation that whenever a tax is to be fixed by assessment the due assessment must precede any valid claim of such tax does not apply to license taxes, except where the statute expressly so provides, or where the tax is according to value, or depends upon the ascertainment of person or value by some designated official.”

(25 Cyc. p. 628.)

It is said that the fact that a lien on the property is reserved for the taxes shows that this is a property tax, but

“In order to accomplish the certain collection of license taxes, the statute may declare that such taxes shall be a lien on the property assessed and entitled to be paid in preference to all mortgages and encumbrances.”

(25 Cyc. p. 628.) [58]

It is said that there is no such business or line of business as fish-traps and that that fact, together with the fact that dummy traps are included, is proof positive that this is a property tax pure and simple—a tax on the *res* and not on the business. A dummy trap is a sham trap not used for fishing but designed simply to squat on and hold a trap lo-

cation. None of the traps in question are dummy traps. The complaint seeks to recover the license tax from "fishing" traps, and if the tax on them is valid it would not matter that the tax on dummy traps is invalid.

It is true there is no such business or line of business as fish-traps, but this is a mere "inaptitude of expression." The meaning is plain when the language is read in connection with that knowledge of the fishing business (one of the main enterprises of Alaska) common to all our people and of which the legislature will not be considered ignorant and of which the Court will take judicial notice. The legislature meant that whoever conducts the business of fishing by means of fish-traps must pay the license required by law. Although taxation statutes are to be strictly construed against the taxing power, yet they are to be construed to mean something, if possible, and are not to have their vitality frittered away by technical refinements.

Cyc.

The demurrer in each case will be overruled.

ROBERT W. JENNINGS,

Judge. [59]

Filed in the District Court, District of Alaska, First Division. Aug. 11, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

[Endorsed]: No 1325-A. In the United States District Court for the District of Alaska. Division No. One. The Territory of Alaska, Plaintiff, vs. Alaska Pacific Fisheries, a Corporation, Defendant. Memorandum Opinion. [60]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1325-A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

No. 1326-A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

HOONAH PACKING COMPANY, a Corporation,
Defendant.

Opinion.

In its opinion rendered on the occasion of overruling the demurrer to the complaint in this cause, the Court decided in favor of plaintiff all the questions now presented (at the trial hereof) except

1. The question as to whether or not the term of the legislature had expired when chapter 76, Laws of the Alaska legislature of 1915 was passed;

2. The question as to whether or not the catching of fish to be canned and then sold is “engaging in the fishing business”;

and those two questions will be now considered.

(1) The Organic Act (sec. 413 Compiled Laws of Alaska, 1913) provides:

“That the legislature of Alaska shall convene at the capitol at the city of Juneau, Alaska, on the first Monday in March in the year nineteen hundred and thirteen, and on the first Monday in March every two years thereafter; but [61] the said legislature shall not continue in session longer than sixty days in any two years unless again convened in extraordinary session by proclamation of the Governor.”

By the stipulation of facts it appears that the legislature convened on the 1st day of March, 1915, at 12 o'clock noon. By the Organic Act it is not to continue in session longer than 60 days in any two years. By the stipulation it also appears that the act in question “was finally passed by both Houses of the legislature and approved by the Governor and was enrolled and filed in the office of the Secretary of State for the Territory as it now appears in the printed volume of the Session Laws of Alaska for 1915—Chapter 76.”

Conceding, for the sake of argument only, that that clause of the stipulation does not settle the matter and preclude any further inquiry, this question arises: At what time did the 60 days mentioned in the Organic Act expire?

There seems to be a conflict of authorities as to whether or not Sundays and holidays are to be included in counting the sixty days. The cases of *Cheyney vs. Smith*, 23 P. R. 680 (Ariz.), of *Moog vs. Randolph*, 77 Ala. 608, and some others, hold to the negative: In the dissenting opinion in the Arizona case some authorities holding to the affirmative are

collected; and in an opinion dated March 16, 1889, given by Attorney General Miller to the Secretary of the Interior that official distinctly held that Sundays and holidays are to be counted as days of the session; (Vol. 19, p. 259, Opinions of Attorneys General); but however, this may be, the Alaska legislature of 1915, convened at noon on the 1st day of March, 1915, and adjourned *sine die* between 3 and 4 o'clock A. M. (sun time), on April 30, 1915, (see stipulation); so that even counting Sundays and holidays, it did not continue in session longer than 60 days; for the full [62] period of sixty days did not expire until noon of the 60th day—that is noon of April 30, 1915.

White vs. Hinton, 17 L. R. A. 66 (Wyo.).

As to the second question: defendant contends that the catching of the fish is a mere adjunct of the canning business, without which the latter cannot or does not exist; That it is not engaged in the business of fishing but in the business of canning, and that by act of Congress approved June 26, 1906, (34 Stats. at Large, 478) it was provided that the tax therein prescribed for carrying on the business of canning shall be “in lieu of all other license fees and taxes therefor and thereon.” The argument, if carried out logically, would result in the proposition that Congress itself having said that the license tax provided in the act shall be in lieu of all other license fees and taxes, could not by a later law impose for the future a license larger in amount than that which was imposed by the former act, or tax the different branches or instrumentalities

of the canning business. Such a proposition is untenable, for the power of Congress is plenary in the matter. What Congress could do in this matter the territorial legislature can do, for the power of the latter extends to "all rightful subjects of legislation" not forbidden by the Organic Act (Organic Act, Sec. 416), and "except as herein provided, all laws now in force in Alaska shall continue in full force and effect until altered, amended or repealed by Congress or by the legislature" (Organic Act, C. L. 410); and "Provided further: That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses." As Congress, then, could provide that all persons catching fish for canning shall pay a certain license tax, and all persons canning the captured fish shall pay [63] and additional license tax, so the legislature also may provide the same thing. Now, that is just what the legislature has done by the act in question: It has provided that all persons in the business or line of business of catching fish by means of fish-traps (whether or not they catch the fish for canning purposes) shall pay \$100, and all persons canning the captured fish (whether the fish are caught in traps or nets or seines) shall pay 4 cents per case, etc.—in other words, a license tax for catching and a license tax for canning.

Findings and judgment for plaintiff as per stipulation.

Judge.

Filed in the District Court, District of Alaska,
First Division, Nov. 30, 1915. J. W. Bell, Clerk.
[64]

**[Certificate of Clerk U. S. District Court to Tran-
script of Record.]**

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

United States of America,
District of Alaska,
Division No. 1,—ss.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached sixty-four pages of typewritten matter, numbered from 1 to 64, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe of attorneys for defendant and plaintiff in error, on file in my office and made a part hereof, in Cause No. 1325-A, wherein the Territory of Alaska is plaintiff and defendant in error and Alaska Pacific Fisheries, a corporation, is defendant and plaintiff in error.

I further certify, that the said record is by virtue of the writ of error and citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to Twenty-nine and 85/100 Dollars (\$29.85) has been paid to me by counsel for plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the above-entitled court this 10th day of December, 1915.

[Seal]

J. W. BELL,
Clerk of the District Court, for the District of
Alaska, Division No. 1. [65]

[Endorsed]: No. 2709. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Pacific Fisheries, a Corporation, Plaintiff in Error, vs. The Territory of Alaska, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed December 18, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer

Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

ALASKA PACIFIC FISHERIES,
a Corporation

Plaintiff In Error

vs.

TERRITORY OF ALASKA,

Defendant In Error

HOONAH PACKING CO., a Corporation,

Plaintiff In Error

vs.

TERRITORY OF ALASKA,

Defendant In Error

UPON WRITS OF ERROR TO THE DISTRICT
COURT FOR ALASKA, DIVISION NO. 1.

Brief for the Defendant in Error

J. H. COBB,
Chief Counsel for the Territory of Alaska.

United States
Circuit Court of Appeals
For the Ninth Circuit

ALASKA PACIFIC FISHERIES,
a Corporation

Plaintiff In Error

vs.

TERRITORY OF ALASKA,

Defendant In Error

HOONAH PACKING CO., a Corporation,

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vs.

TERRITORY OF ALASKA,

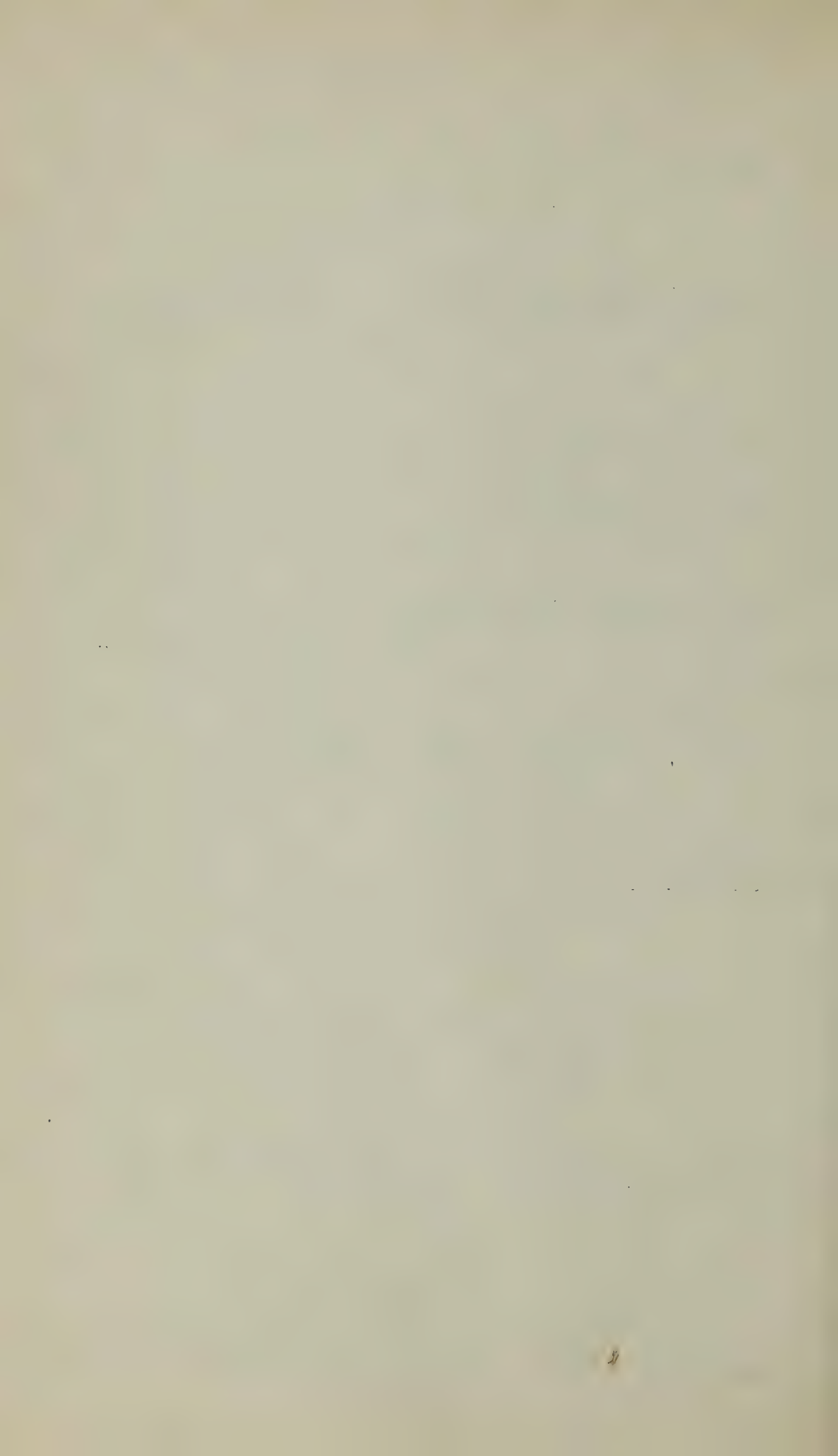
Defendant In Error

UPON WRITS OF ERROR TO THE DISTRICT
COURT FOR ALASKA, DIVISION NO. 1.

Brief for the Defendant in Error

J. H. COBB,

Chief Counsel for the Territory of Alaska.



STATEMENT OF THE CASE

These two cases were tried together in the Court below, and as they involve identically the same question, we will treat the two together in this Brief.

By an Act approved April 29, 1915, (Session Laws of Alaska, 1915, page 185,) the business of operating a fish trap in Alaska was taxed by a License Tax in the sum of One Hundred (\$100.00) dollars. By a proviso in Section 2 of the Act (Session Laws 1915, page 188.)

“Any person, firm or corporation now engaged in any of the lines of business specified in Section 1, shall comply with this Act, on or before July 1st, 1915, by applying for the License (and paying the tax, if a fixed sum) for the current year ending December 31st, 1915, and all taxes for the current year shall be calculated for the year beginning January 1st, and ending December 31st, 1915.”

By Section 4, a right of civil action for the tax was given.

Under the provisions of this Act, the Territory of Alaska filed its complaint against the Alaska Pacific Fisheries, alleging that during the month of June, 1915, and continuously up to the time of the filing of the complaint, which was on July 10, 1915, the defendant was engaged in the business of operating 22 fish traps, all within the waters of Southeastern Alaska, and subject to the tax of One Hundred

(\$100.00) dollars each. And it was further alleged that the defendant had failed, neglected and refused to pay the said License Tax, or any part thereof, and judgment was prayed for Twenty-two Hundred (\$2200.00) dollars.

In Case No. 2713 a similar complaint was filed on July 7, 1915, alleging that the defendant was operating eleven fishing traps in the waters of South-eastern Alaska, and had failed, neglected and refused to pay the License Tax.

To these complaints, demurrers were interposed which, so far as material to the points involved, attacked the Act of the Alaska Legislature under which the actions were brought, on the ground

First, That the Act was void and was beyond the power of the Legislature to enact under the Act of Congress creating the Alaska Legislature and the Constitution of the United States.

Second, That the Act was void, because the tax attempted to be laid by the Act referred to in the complaint was not uniform upon the same class of subjects, in that said Act taxes fish traps and gill nets, while seines are not taxed, thereby imposing a burden upon those fishing by means of traps and gill nets which is not imposed upon those fishing by means of seines.

Third, Act referred to is void, in that it is an attempt to lay and collect a tax without any reference to the value of the thing taxed, contrary to the provisions of the Organic Act.

Four, That the tax imposed by the Act of the Legislature is in fact a specific tax on property, and as such is levied without any reference to the value of the property sought to be taxed, and is therefore contrary to the provisions of the Organic Act in that regard.

The demurrers were overruled in an opinion rendered by the trial court on August 11, 1915.

Thereafter, the defendants answered in each case, and, in addition to raising the same points by the answer that had been raised by the demurrer, two other points were raised, namely,

First, Whether the Act laying the tax was not void, because, as alleged, the term of the Legislature had expired when the law was passed?

Second, As to whether or not the catching the fish to be canned and then sold is engaging in the fishing business, within the meaning of the law?

Both cases were tried upon agreed statements of fact. The Court adopted the facts agreed upon, as the facts in the case sustained the law passed by the Alaska Legislature upon all points, and rendered a judgment in favor of the Territory against each of the defendants for the amounts stipulated, in the event the Court was of the opinion that the law was valid.

The opinions of the trial court rendered upon the demurrer and on the rendition of the judgments, seem to us so clear and conclusive on all the points raised, that we shall content ourselves with adopting the reasoning and authorities therein cited.

The opinion on the demurrers, is found in the Record in 2709, at page 47, and in 2713 at page 6, and is as follows:—

By Act approved April 29, 1915, the Legislature of Alaska provided as follows:

“Section 1. That any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in the Territory of Alaska, shall apply for and obtain a license and pay for said license, for the respective lines of business as follows:

.....
 8. Fish traps, fixed or floating, \$100.00 per annum. So-called dummy traps included.”

It also provides in Section 2 that

“Every person, firm or corporation desiring to engage in any of the lines of business specified in Section 1, shall first apply to and obtain from the Territorial Treasurer a license. If the tax for the license applied for is a fixed sum, the amount of such license tax shall accompany the application.”

Said Section 2 further provides for the bringing of a suit, either civil or criminal, to collect the license, and Section 4 of the said Act provided:

“Special remedies provided by this Act * * * shall not be deemed exclusive, and any appropriate remedy, either civil or criminal or both, may be revoked by the Territory in the collec-

tion of all taxes; and in civil actions the same penalties may be collected as are herein provided in criminal actions.”

Under the provisions of this Act of the Legislature, the Territory of Alaska brought suit against the defendant, alleging in the complaint:

“That during the month of June, 1915, and continuously up to the present time the defendant was engaged in and prosecuting and attempting to prosecute the business of fishing by means of fish-traps situate in the waters of Alaska, and that it has failed, neglected and refused to pay the license tax, or any part thereof, provided for by said Act of the Legislature. Wherefore the Territory asks judgment for the amount of the license tax due.”

To this a demurrer has been interposed, on the ground that the said complaint does not state facts sufficient to constitute a cause of action, and in support of the demurrer the point is raised that the Legislature had no power to impose such a tax, for the reasons—

1. Congress has reserved to itself the exclusive control of the fish and game of Alaska. (6)

2. The said tax is in violation of Section 9 of the Organic Act of the Territory (Act of June 26, 1906 aforesaid), which provides:

“All taxes shall be uniform upon the same class of subjects and shall be levied and collected under the general laws, and the assessment shall

be according to the actual value thereof."

As to the first point raised in support of the demurrer, to-wit: "Congress has reserved for itself the exclusive control of the fish and game of Alaska"; it is urged that by the Act approved June 26, 1906, 34 Stat. L. 478 Congress provided:

"That every person, company or corporation carrying on the business of canning, curing or preserving fish, or manufacturing fish products within the Territory known as Alaska * * * shall, in lieu of all other license fees and taxes therefor and thereon, pay a license tax on their said business and output as follows:

Canned Salmon, 4c per case;

Pickled Salmon, 10c per barrel;

Salt Salmon in bulk, 5c per 100 pounds;

Fish Oil, 10c per barrel;

Fertilizer, 20c per ton";

and that the Organic Act of the Territory, passed six years after the Act of 1906, and which provides:

"that the power of the Legislature should not extend to the fish laws * * * or to the laws of the United States providing for taxes on business and trade; provided, further, that this provision shall not operate to prevent the Legislature for imposing other and additional taxes or licenses" (C. L. 1913, Sec. 421).

should be taken to mean that the Legislature is not prohibited from imposing other and additional licenses or taxes "on other kinds of industries and on

other kinds of business or trade not covered by the Act of 1906.”

The reasoning advanced why the Court should so hold is not convincing—on the contrary, as the Organic Act is the latest expression of the legislative will on the subject, it would seem that it must be taken as repealing that part of the former act which is in conflict therewith, to-wit; “shall, in lieu of all other license fees and taxes.” For the Court to hold that the later act does not repeal the former act to the extent indicated, it would be compelled to read into the later act some words which (7) are not there, to-wit: “On other kinds of industries and on other kinds of business or trade not covered by the act of 1906.” This would not be justified by any canon of construction. The very position of the proviso in the statute shows what Congress had in mind, to-wit, that in imposing other and additional licenses or taxes the Legislature should not be fettered by anything contained in the act of 1906. It is not apparent that there is any need of construction, for the language is plain and unambiguous. A reference to the debates in Congress when the bill was before it would clear up any ambiguity if, indeed, any such existed.

The bill came up for argument on Wednesday, the 24th of April, 1912. In its original form the proviso was as follows:

“That the authority herein granted to the Legislature to alter, amend, modify and repeal

laws in force in Alaska shall not extend to the customs, internal revenue, postal or other general laws of the United States”;

and nothing was there said about the game or the fish. Whereupon the following occurred:

Mr. WILLIS.—Mr. Chairman, I offer the following amendment, which I send to the desk and ask to have read.

The Clerk read as follows:

Line 9, page 23, after the word “States,” insert the words “or to the game laws of the United States applicable to Alaska.”

Mr. MANN.—Why not make it game and fish laws?

Mr. WICKERSHAM.—Mr. Chairman, I think the fish laws ought to be left alone.

Mr. MANN.—Why not make it game and fish laws, so that they cannot repeal the fish laws? They can pass new fish laws.

Mr. WILLIS.—Mr. Chairman, I will accept that amendment, and ask unanimous consent that it be so modified and reported as modified.

The CHAIRMAN.—Without objection, the amendment will be so modified, and the clerk will report the amendment as so modified.

The Clerk read as follows:

Line 9, page 23, after the word “States” insert the words “or to the game and fish laws of the United States applicable to Alaska.”

Mr. WICKERSHAM.—Mr. Chairman, I do not

think that the word "fish ought to be in there. I think the fisheries in Alaska need protection. They belong to the people of the State or to the Territory, and they do not belong to the Government of the United States. They are not now being protected. They are not now being conserved, and if this Legislature will do something toward conserving and protecting the fish it ought to be allowed to do it. This simply bars the Legislature from protecting the fisheries in that Territory, and it ought not to be in the bill. (8)

Mr. MANN.—The gentleman will notice this provision does not apply to passing laws, but only to the repealing of laws.

Mr. WILLIS.—It seems to me the observation of the gentleman from Illinois answers the objection of the gentleman from Alaska. It simply provides, if it shall be adopted, that the Legislature of the Territory of Alaska shall not have the power to alter, amend or repeal the United States fish or game laws now in force in the Territory. It does not take away from the Legislature the power to pass additional laws of that character. It seems to me that meets the objection.

Mr. WICKERSHAM.—I think they ought to be allowed to amend them.

Mr. WILLIS.—We have a Federal fish law in Alaska. The gentleman is not objecting to that.

Mr. WICKERSHAM.—No.

Mr. WILLIS.—That is all this amendment pro-

vides—that the Legislature shall not have the power to amend the present fish or game laws.

Mr. WICKERSHAM.—What does that mean?

Mr. WILLIS.—It means that the present law shall stand.

Mr. FLOOD of Virginia. Suppose Congress passes a law revising and extending the fish laws there?

Mr. WILLIS.—Well, undoubtedly that will be paramount law of Alaska.

Mr. FLOOD of Virginia. What will be the effect of the gentleman's amendment?

Mr. WILLIS.—The effect of this amendment will be, as I understand it, simply to take away from the Legislature of Alaska the power to amend the fish or game laws now in effect in Alaska.

Mr. FLOOD of Virginia. It would not have the effect to take away from the Legislature of Alaska the power to amend the fish laws we hereafter pass.

Mr. WILLIS.—No; I do not think it would, as I have worded it, although I did not have that in mind when I drafted the amendment.

Mr. MANN.—They would not have that power.

Mr. WILLIS.—They would not have that power now.

Mr. FLOOD of Virginia. The gentleman is aware of the fact there is a proposition to revise the fish laws?

Mr. WILLIS.—Yes; I think the bill is a good one and ought to pass.

Mr. FLOOD of Virginia. And will in all probability become the law.

Mr. WILLIS.—It seems to me this meets the objection that has been raised in a perfectly fair manner, and I think it is a fair objection, but I do not believe the Legislature ought to repeal the present game or fish laws.

Mr. MANN.—We have endeavored to provide in a way for the conservation of the fisheries and game up there. We ought not to permit those laws to be repealed, but if they want to make them more stringent, and probably do, they ought to have that right.

Mr. FLOOD of Virginia. I do not think the amendment means anything, but if it will please anybody to put it in, why, let it go.

Mr. WICKERSHAM.— I shall withdraw my objection.

The question was taken, and the amendment was agreed to.

(Vol. 48, Part 6, page 5288, Congressional Record, 62nd Congress, Second Session.)

This, however, did not seem to be specific enough for the Senate, for when the bill reached that body it was amended by having added to this provision (9)

“Provided further that this provision shall not operate to prevent the Legislature from imposing other and addition taxes and licenses.”

The House refused to agree to this and to several other amendments, and the committee on Conference of the House reported, recommending that the House recede from its disagreement to this Senate amendment. The House did recede from said disagreement, and the Senate proviso was added to the bill.

This occurred on August 20, 1912, and the record of it is found in said Congressional Record at page ———.

Thus it will be seen—

1. That there is on the face of the bill no expression of any such purpose as is contended for.

2. That no such purpose as is contended for was in the minds of the legislators when the bill passed, but on the contrary what was in their minds was that the Legislature should have the power to levy additional taxes on the fish and the game business and on other businesses.

As to the second point raised in support of the demurrer, to-wit: "The said tax is in violation of section 9 of the Organic Act of the Territory";

A reference to the legislation and to one Supreme Court decision on the subject of the taxation of the fisheries business in Alaska may throw some light on the subject.

By the criminal code of Alaska, adopted March 3, 1899 (C. L. 1913, Sec. 2569), Congress provided:

"That any person or persons, corporation or company prosecuting or attempting to prose-

cute any of the following lines of business, within the District of Alaska shall first apply for and obtain a license so to do from a District Court or a subdivision thereof in said district, and pay for said license for the respective lines of business and trade as follows, to-wit: * * *

Fisheries: Salmon Canneries, 4c per case;
 Salmon Salteries, 10c per barrel;
 Fish Oil Works, 10c per barrel;
 Fertilizer Works, 20c per ton."

The point was raised that this act was in violation of Section 8, Article 1 of the Constitution of the United States, (10) which reads:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, * * * * but all duties, imposts and excises shall be uniform throughout the United States";

and that said act, insomuch as it directed the money to be paid into the Treasury of the United States could not be sustained. The point was passed upon in the case of *Binns v. United States* (194 U. S. 486, decided May 31, 1904), and Justice Brewer, at page 491 says:

"We shall assume that the purpose of the license fees required by Section 460 is the collection of revenue, and that the license fees are excises within the constitutional sense of the terms. Nevertheless we are of the opinion that they are to be regarded as local taxes imposed for the purpose of raising funds to support the

administration of local government in Alaska.

It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same as in all the Territories. We are accustomed to that generally adopted for the Territories, of a *quasi* State Government, with executive, legislative and judicial officers, and a Legislature endowed with the power of local taxation and local expenditures, but Congress is not limited to this form. In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a Legislature elected by the citizens of the Territory. It has provided in the District of Columbia for a board of three Commissioners, who are the controlling officers of the district. It may entrust to them a large volume of legislative power, or it may by direct legislation create the whole body of statutory law applicable thereto. For Alaska, Congress has established a government of a different form. It has provided no legislative body but only executive and judicial officers. It has enacted a penal and civil code. Having created

no legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that Territory. Instead of raising revenue by direct taxation upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes."

And later on in the decision the learned Justice quotes the following from Volume 32 Congressional Record, part 3, page 2235, to-wit:

"The committee on Territories have thoroughly investigated the condition of affairs in Alaska and have prepared certain licenses which in their judgment will create a revenue sufficient to defray all the expenses of the government of the (11) Territory of Alaska.

* * * They are licenses peculiar to the condition of affairs in the Territory of Alaska on certain lines of goods, articles of commerce, etc., which, in the judgment of the committee, should bear a license, inasmuch as there is no taxation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the Committee on Territories, after consultation with prominent citizens of the Territory of Alaska including the Governor and several other officers, this code or list of licenses was prepared by the committee. It was

prepared largely upon their suggestions and upon the information of the committee derived from conversing with them.'

While, of course, it would have simplified the matter and removed all doubt if the statute had provided that those taxes be paid directly to some local treasurer and by him disbursed in payment of Territorial expenses, yet it seems to us it would be sacrificing substance to form to hold that the method pursued when the intent of Congress is obvious, is sufficient to invalidate the taxes.

In order to avoid any misapprehension we may add that this opinion must not be extended to any case, if one should arise, in which it is apparent that Congress is, by some special system of license taxes, seeking to obtain from a Territory of the United States revenue for the benefit of the nation as distinguished from that necessary for the support of the Territorial government."

Thus it will be seen that the license was declared to be a tax and was sustained as not being in contravention of the said article of the Constitution, on account of the fact that the money, although to be paid into the Treasury of the United States, was to be used for the support of the Territory—in other words, that it was a tax imposed on businesses in Alaska by Congress, the then legislative body for Alaska, for local purposes.

Then came the Acts of Congress of March 30, 1906, and of March 24, 1912, *supra*.

Such being the state of Federal legislation on the subject of taxing the fishing industry in Alaska, the Legislature of Alaska passed the act whose validity is here assailed.

We have seen by the Binns case that Congress when imposing a license tax system on businesses in Alaska, was not fettered by the constitutional prohibition as to uniformity. It must be conceded that Congress had plenary power over the Territory—That is, that it could legislate on all rightful subjects of legislation not prohibited by the national constitution. This power it (12) had, not so much from its constitutional power to make rules and regulations for the government of the Territory, as from its inherent power arising from the ownership of the *res*. Having this power, Congress certainly had the power to confer it upon the legislature. It is true that the powers of that legislature are limited by the act defining those powers and that in this respect a Territorial Legislature differs from State Legislatures; that is to say, the Organic Act of a Territory is a grant of specific powers and not a reservation of specific powers.

Congress, when implanting this new jurisdiction in Alaska, expressly provided that the power of the Alaska Legislature

“shall extend to all rightful subjects of legis-

lation not inconsistent with the laws of the United States, but it shall not, etc.”

then follow exceptions too numerous to mention,—more than have obtained in the case of any other Territory,—well nigh emasculating the original grant, and causing it to “speak the word of promise to the ear and break it to the hope.” However, of its pristine vigor there is left enough to justify the imposition of license taxes and property taxes. Such power finds its warrant in the principle that unless a power is forbidden to our Legislature the latter possesses the power—“provided it be a rightful subject of legislation.” That is to say, Congress, ordaining for this Territory an Organic Act, does a thing for the Territory which in its nature but not in its extent, is similar, analogous, to what the people of a State do when they adopt a constitution for the State.

“The legislative power to be exercised by the Territorial Legislature is the legislative power of the Territory, not that of the United States. Both States and Territories, in a certain sense, derive their existence from the legislation of Congress, but the jurisdiction and authority exercised, either by a State or a Territory, is that of a State or Territory, and not that of Congress. Territorial statutes have a distinct and well-defined character of their own. The people of a Territory, when authorized to form a Territorial government, are vested with a

qualified sovereignty. Congress may limit their powers, and may annul their enactments, but, subject to these limitations, the Territory is a government. Its laws, (13) unless set aside by Congress or the Courts, are the laws of the Territory; they are not laws of the United States, within the ordinary meaning of those terms; certainly not in the sense that the Acts of Congress, approved by the President, are laws of the United States." (16 Fed. 715.)

This being true, the inquiries are these:

(a) When the Legislature imposed this license tax, was it exercising power over a rightful subject of legislation? If it was not so exercising power, the enactment must fall; if, however, it was so exercising power, the enactment must stand, unless it violates some other provision of the constitution, (Organic Act.)

25 Cyc. p. 599, Sec. 3, and cases cited in Note 16.

(b) Pursuing the argument, then: Such power, being a rightful subject of legislation, exists in the Legislature of this Territory unless there is some provision in the Organic Act which negatives the power. If there is any such provision, where is it to be found?

Counsel for defendant affects to find it in that provision of the Organic Act which declares that "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and assessments shall be according to the value

thereof. No taxes shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein any one year.”

If this uniformity requirement applied to anything except direct property taxes the argument might prevail—but that in fact it does apply exclusively to direct property taxes and to nothing else has been decided so often as to be beyond cavil.

25 Cyc. p. 605-6, and cases cited.

“The constitutions of many of the states contain the requirement that taxation shall be equal and uniform, that all property (14) in the state shall be taxed in proportion to its value, that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, or that the Legislature shall provide for an equal and uniform rate of assessment and taxation; and in the face of such provisions a tax law which violates the prescribed rule of equality and uniformity is invalid, although there is sufficient difference in the wording of the different provisions to account for some lack of uniformity in the decisions as to what constitutes a violation of their requirements. The requirement does not apply to every species of taxation, and does not restrict the Legislature to the levying of taxes upon property alone. The restriction relates only to the rate or amount of taxation and its incidence upon taxable persons and property, and

does not limit the Legislature in regulating the mode of levying and collecting the taxes imposed, and it also relates only to property within the state, and neither the statutes of another state nor the action of taxing officers can affect the question. In the absence of such a constitutional requirement it is not essential to the validity of taxation that it shall be equal and uniform, and in such a case a tax law cannot be declared unconstitutional merely because it operates unequally, unjustly, or oppressively.

The requirement of equality and uniformity applies only to taxes in the proper sense of the word, levied with the object of raising revenue for general purposes, and not to such as are of an extraordinary and exceptional kind, or to local assessments for improvements levied upon property specially benefitted thereby, or to other burdens, charges, or impositions which are not properly speaking taxes; and further, such a constitutional provision is to be restricted to taxes on property, as distinguished from such as are levied on occupations, business, or franchises, and on inheritances and successions, and as distinguished also from exactions imposed in the exercise of the police power rather than that of taxation.

The principle of equality and uniformity does not require the equal taxation of all occupations or pursuits, nor prevent the Legislature from

taxing some kinds of business while leaving others exempt, or from classifying the various forms of business, but only that the burdens of taxation shall be imposed equally upon all persons pursuing the same avocation, or that if those following the same calling are divided into classes for the purpose of taxation, the basis of classification shall be reasonable and founded on a real distinction, and not merely arbitrary or capricious. To this extent, also, and no further, the principle applies to license fees or taxes imposed under the police power or for the better regulation of occupations supposed to have an important public aspect."

(37 Cyc., 729-33.)

"It is argued that the legislature has only such powers of taxation as is conferred by Section 9 of the Organic Act. But this is a mistake. It is true that that section expresses the limit of its powers as to direct property taxation, but it is elsewhere granted the express power to raise revenue by license taxes (C. L. 1913, S. 410), and as a matter of fact that is the only method of taxation which the Legislature has adopted.

It is said that the system of taxation adopted is the exercise of special and not general legislation. This position is untenable. See *Codlin v. Kohlhausen*, 58 P. R. 499.

It is said that there has been no assessment, but

"The cardinal rule in taxation that whenever

a tax is to be fixed by assessment the due assessment must precede any valid claim of such tax does not apply to license taxes, except where the statute expressly so provides, or where the tax is according to value, or depends upon the ascertainment of persons or value by some designated official.”

(25 Cyc., p. 628.)

It is said that the fact that a lien on the property is reserved for the taxes shows that this is a property tax, but

“In order to accomplish the certain collection of license taxes, the statute may declare that such taxes shall be a lien on the property assessed and entitled to be paid in preference to all mortgages and incumbrances.”

(25 Cyc., p. 628.)

It is said there is no such business or line of business as fish-traps and that that fact, together with the fact that dummy traps are included is proof positive that this is a property tax pure and simple—a tax on the *res* and not on the business. A dummy trap is a sham trap not used for fishing, but designed simply to squat on and hold a trap location. None of the traps in question are dummy traps. The complaint seeks to recover the license tax from “fishing” traps, and if the tax on them is valid, it would not matter that the tax on dummy traps is invalid.

It is true there is no such business or line of business as fish-traps, but this is a mere “inapti-

tude of expression,”—The meaning is plain when the language is read in connection with that knowledge of the fishing business (one of the main enterprises of Alaska) common to all our people and of which the Legislature will not be considered ignorant and of which the Court will take judicial notice. The Legislature meant that whoever conducts the business of fishing by means of fish-traps must pay the license required by law. Although taxation statutes are to (16) be strictly construed against the taxing power, yet they are to be construed to mean something, if possible, and are not to have their vitality frittered away by technical refinement.”

The opinion in the final hearing is found in the record in 2709, at page 67, and 2713 at page 42, and is as follows:—

“In its opinion rendered on the occasion of overruling the demurrer to the complaint in this cause, the Court decided in favor of plaintiff all the questions now presented (at the trial *all* herof) except

1. The question as to whether or not the term of the Legislature had expired when Chapter 76, Laws of the Alaska Legislature of 1915 was passed:

2. The question as to whether or not the catching of fish to be canned and then sold is “engaging in the fishing business;

and those two questions will now be considered.

(1) The Organic Act (Sec. 413, Compiled Laws of Alaska 1913) provides: (35).

“That the Legislature of Alaska shall convene at the capitol at the City of Juneau, Alaska, on the first Monday in March in the year nineteen hundred and thirteen, and on the first Monday in March every two years thereafter; but the said Legislature shall not continue in session longer than sixty days in any two years unless again convened in extraordinary session by a proclamation of the Governor.”

By the stipulation of facts it appears that the Legislature convened on the 1st day of March, 1915, at 12 o'clock noon. By the Organic Act it is not to continue in session longer than 60 days in any two years. By the stipulation it also appears that the act in question “was finally passed by both houses of the Legislature and approved by the Governor and was enrolled and filed in the Office of the Secretary of State for the Territory as it now appears in the printed volume of the Session Laws for 1915—Chapter 76.”

Conceding for the sake of argument only, that that clause of the stipulation does not settle the matter and preclude any further inquiry, this question arises: At what time did the 60 days mentioned in the Organic Act expire?

There seems to be a conflict of authorities as to whether or not Sundays and holidays are to be included in counting the sixty days. The cases of

Cheyney vs. Smith, 23 P. R. 680 (Ariz.), of Moog vs. Randolph, 77 Ala. 608, and some others, hold to the negative: In the dissenting opinion in the Arizona case some authorities holding to the affirmative are collected; and in an opinion dated March 16, 1889, given by Attorney General Miller to the Secretary of the Interior that official distinctly held that Sundays and holidays are to be counted as days of sessions; (Vol. 19. p. 259, Opinions of Attorneys General); but, however this may be, the Alaska Legislature of 1915, convened at noon on the 1st day of March, 1915, and adjourned *sine die* "between 3 and 4 o'clock A. M. (sun time), on April 30, 1915, (see stipulation); so that even counting Sundays and holidays, it did not continue in session longer than 60 days; for the full period of sixty days did not expire until noon of the 60th day— (36) that is noon of April 30, 1915.

White v. Hinton, 17 L. R. A. 66 (Wyo.)

As to the second question: Defendant contends that the catching of fish is a mere adjunct of the canning business, without which the latter cannot or does not exist; that it is not engaged in the business of fishing but in the business of canning, and that by Act of Congress approved June 26, 1906, (34 Stats. at Large 478), it was provided that the tax therein prescribed for carrying on the business of canning shall be "in lieu of all other license fees and taxes therefor and thereon." The argument, if carried out logically, would result in the proposition

that Congress itself having said that the tax provided in the act shall be in lieu of all other license fees and taxes, could not by a later law impose for the future a license larger in amount than that which was imposed by the former act, or taxing the different branches or instrumentalities of the canning business. Such a proposition is untenable, for the power of Congress is plenary in the matter. What Congress could do in this matter the Territorial Legislature can do, for the power of the latter extends to "all rightful subjects of legislation" not forbidden by the Organic Act (Organic Act, Sec. 416), and "except as herein provided, all laws now in force in Alaska shall continue in full force and effect until altered, amended or repealed by Congress or by the Legislature" (Organic Act, C. L., 410); and "Provided further: That this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses." As Congress, then, could provide that all persons catching fish for canning shall pay a certain license tax, and all persons canning the caught fish shall pay an additional license tax, so the Legislature, also, may provide the same thing. Now, that is just what the Legislature has done by the act in question: It has provided that all persons in the business or line of business of catching fish by means of (37) fish-traps, (whether or not they catch the fish for canning purposes) shall pay \$100, and all persons canning the caught fish (whether the fish are caught in traps or nets

or seines) shall pay 4 cents per case, etc.—in other words, a license tax for catching and a license tax for canning.

Findings and judgment for plaintiff as per stipulation.

Nothing, it seems, can be added to the foregoing, except perhaps to say that Congress did exempt one species of business and property in Alaska from the operation of all Territorial Tax Laws, namely railroads, by providing in Section 9 of the Organic Act, "that the Congress reserves the exclusive power for five years from the date of the approval of this act to fix and impose any tax or taxes upon railways or railway property in Alaska." If it had intended to exempt this fisheries also, it certainly could have so provided in equally unambiguous terms.

In conclusion we respectfully submit that the judgments are right and should be affirmed.

J. H. COBB,

Chief Counsel for the Territory of Alaska.

No. 2709.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,
vs.
TERRITORY OF ALASKA,
Defendant in Error.

PETITION FOR REHEARING.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff in Error.

THE JAMES H. BARRY CO.

Filed

OCT 4 - 1916

F. D. Monckton,

CLERK

IN THE
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ALASKA PACIFIC FISHERIES, a corporation,	} No. 2709
vs.	
TERRITORY OF ALASKA, <i>Plaintiff in Error,</i> <i>Defendant in Error.</i>	

PETITION FOR REHEARING.

Comes now the Alaska Pacific Fisheries, plaintiff in error, and respectfully petitions this Honorable Court for a rehearing herein on the following grounds and for the following reasons:

This case involves to some extent the same questions that arose in the case of Alaska Mexican against the Territory and the case of the Alaska Pacific Fisheries against the Territory, No. 2731, but the Act under which the tax in this case was laid, being a different Act enacted by a subsequent Legislature, many of the objections that were urged against the Act under which the taxes were laid in those cases,

do not exist in this case. The most important proposition, however, that presented itself in those cases also presents itself here. This deals with the power of the Territorial Legislature to impose a license tax in Alaska without regard to the limitations upon the taxing power contained in the Organic Act, to the effect that all taxes must be uniform and assessed according to value, as well as the other limitations limiting the amount of the tax. This proposition was quite fully discussed in the *Alaska Mexican* against the Territory, and in the case of the *Alaska Pacific Fisheries vs. Territory*, No. 2731, some of the more important matters in relation thereto were pointed out more specifically so as to supplement what was said in the case of *Alaska Mexican* against the Territory. It is not necessary, therefore, that we should again go into this matter here and we therefore submit this proposition upon the reasons and the discussion presented in the two other cases.

One point of importance presents itself in this case that did not present itself, at least not in the same manner, in the other two cases, and that deals with the proposition that the tax in question is not a license tax but a property tax. While it is denominated a license tax it is assessed at the rate of \$100 per fish trap.

This question was quite fully discussed in our brief where many authorities were cited and discussed to show that a tax of this character, although called a

license tax, is in fact a property tax and the special attention of the Court is directed to one of the cases referred to in the brief, which we think is exactly in point.

The Standard Oil Co. vs. The Commonwealth,
82 S. W., 1020.

This case is discussed on page 45 of the brief. In that case the Legislature of the State of Kentucky imposed what was denominated a license tax and one of the things enumerated upon which the tax had to be paid, was oil depots, and the amount was fixed at \$10. We can see no difference in the act under discussion and the Kentucky Act, except that in the present case the tax is laid on fish traps at the rate of \$100 each and in the Kentucky case it was laid on oil depots at the rate of \$10 each.

The Supreme Court of Kentucky held this to be a property tax and void, because it was not assessed according to value. In this connection we wish to call the Court's attention to one further matter. The Court seem to have gathered the impression that there was some peculiar phraseology in common use in Alaska which lent to the language employed in the act a local meaning. There is nothing in the evidence or stipulation upon this point, and we know of no peculiar phraseology in use in the Territory that has any relation to the matter whatsoever.

Many other cases are referred to and discussed in

the brief, but we will not burden the Court by again reviewing them here.

Another point presented upon the argument of this case was that in view of the fact that some of the canneries in Alaska were so situated because of natural conditions, that fish were caught by seines, while others were so situated that their fish supply must be caught by the use of fish traps, a tax levied upon fish traps and not upon seines, or upon those who were obliged to use fish traps and not upon those who were able to catch their fish by the use of seines, is an unjust discrimination against those who are so situated that their fish supply must be secured by the use of fish traps. This question was also quite fully discussed in our brief so that a further discussion is not necessary.

We take it from the opinion that the Court did not disagree with us upon the point that persons situated like the plaintiff in error were discriminated against, but the Court were of the opinion that Congress might make such discrimination and might delegate the power to do so to the Territorial Legislature.

In relation to this matter, however, we think that the case is controlled by the decision of this Court in the case of *Peacock vs. Pratt*, 121 Fed., 272.

The power of the Territorial Legislature is by express provision of our Organic Act limited by the provisions of the Constitution of the United States

and such was also the case under the Organic Act of Hawaii and the validity of the tax in question in the Hawaii case was determined with reference to the provisions of the 14th amendment. The general rule, we think, with reference to this matter may be stated as follows:

That no tax may be imposed upon one person which is not imposed upon another similarly situated. And we think that our discussion in the opening brief clearly shows that under this rule canneries forced to use fish traps under the peculiar conditions existing in Alaska, stipulated into the record, are discriminated against in favor of those who are able to use seines.

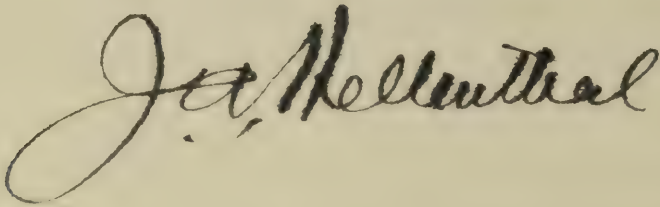
It was also urged upon the hearing that since according to the stipulated facts some of the appellant's fish traps were not worth in excess of \$1,000, the tax was confiscatory in its nature. The Court held that our contention in this regard was not well founded. But even though our contention were not well founded, it supplies a very forceful argument, in our judgment, why license taxes should not be permitted to be levied without regard to the value of the thing levied upon, for it shows how easily the limitations imposed by Congress to the effect that taxes shall not exceed 1 per cent. upon the value of the property taxed, can be evaded, if license taxes of the character herein

referred to can be imposed without regard to the limitations upon the taxing power.

Respectfully submitted.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff in Error.

J. A. HELLENTHAL hereby certifies that he is counsel for the plaintiff in error, the petitioner herein, and that in his judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

A handwritten signature in cursive script, reading "J. A. Hellenthal". The signature is written in dark ink and is positioned below the printed text of the certificate.

In the
United States
Circuit Court of Appeals

For the Ninth Circuit

ALASKA PACIFIC FISHERIES,
a Corporation,

Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States
District Court for the District of
Alaska, Division No. 1

HELLENTHAL & HELLENTHAL,
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In the
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Upon Writ of Error to the United States
District Court for the District of
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Attorneys for Plaintiff in Error.

STATEMENT OF FACTS

This is an action brought to recover taxes claimed to be due under an act of the Territorial Legislature.

Congress passed an act relating to the fisheries of Alaska in June 1906, the first section of which reads as follows:

“That every person, company, or corporation carrying on the business of canning, curing, or preserving fish or manufacturing fish products within the territory known as Alaska, ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty seven, or in any of the waters of Alaska over which the United States has jurisdiction, shall, in lieu of all other license fees and taxes therefor and thereon, pay license taxes on their said business and output as follows: Canned salmon, four cents per case; pickled salmon, ten cents per barrel; salt salmon in bulk, five cents per one hundred pounds; fish oil, ten cents per barrel; fertilizer, twenty cents per ton. The payment and collection of such license taxes shall be under and in accordance with the provisions of the act of March third, eighteen hundred and ninety-nine, entitled “ ‘An act to define and punish crimes in the district of Alaska, and

to provide a code of criminal procedure for the district,' " and amendments thereto."

In August, 1912, Congress passed the Organic Act, providing among other things for a Territorial Legislature. This act reads as follows: (The pertinent portions are in Italics.)

(PUBLIC—NO. 334.)

(H. R. 38.)

An Act to create a legislature in the Territory of Alaska, to confer legislative power thereon, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

ALASKA TERRITORY ORGANIZED.—That the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall be and constitute the Territory of Alaska under the laws of the United States, the government of which shall be organized and administered as provided by said laws.

SEC. 2. CAPITAL AT JUNEAU.—That the capital of the Territory of Alaska shall be at the city of Juneau, Alaska, and the seat of government shall be maintained there.

SEC. 3. CONSTITUTION AND LAWS OF UNITED STATES EXTENDED.—*That the Constitution of the*

United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature: Provided, That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to bur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes," approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof: Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. And the legislature shall pass no law depriving the judges and officers of the district court

of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States.

SEC. 4. THE LEGISLATURE.—That the legislative power and authority of said Territory shall be vested in a legislature, which shall consist of a senate and house of representatives. The senate shall consist of eight members, two from each of the four judicial divisions into which Alaska is now divided by Act of Congress, each of whom shall have at the time of his election the qualifications of an elector in Alaska, and shall have been a resident and an inhabitant in the division from which he is elected for at least two years prior to the date of his election. The term of office of each member of the senate shall be four years: *Provided*, That immediately after they shall be assembled in consequence of the first election they shall, by lot or drawing, be divided in each division into two classes; the seats of the members of the first class shall be vacated at the end of two years and the seats of the members of the second class shall be vacated at the end of four years, so that one member of the senate shall, after the first election, be elected bienially at the regular election from each division. The house of representatives shall consist of sixteen members, four from each of the four judicial divisions into which Alaska is now divided by Act of Congress. The term of office of each representative shall be for two years and each representative shall possess the same qualifications

as are prescribed for members of the senate and the persons receiving the highest number of legal votes in each judicial division cast in said election for senator or representative shall be deemed and declared elected to such office: *Provided*, That in the event of a tie vote the candidates thus affected shall settle the question by lot. In case of a vacancy in either branch of the legislature the governor shall order an election to fill such vacancy, giving due and proper notice thereof. That each member of the legislature shall be paid by the United States the sum of fifteen dollars per day for each day's attendance while the legislature is in session, and mileage, in addition, at the rate of fifteen cents per mile for each mile from his home to the capital and return by the nearest traveled route.

SEC. 5. ELECTION OF MEMBERS OF THE LEGISLATURE.—That the first election for members of the Legislature of Alaska shall be held on the Tuesday next after the first Monday in November, nineteen hundred and twelve, and all subsequent elections for the election of such members shall be held on the Tuesday next after the first Monday in November biennially thereafter; that the qualifications of electors, the regulations governing the creation of voting precincts, the appointment and qualifications of election officers, the supervision of elections, the giving of notices thereof, the forms of ballots, the register of votes, the challenging of voters, and the returns and the canvass of the returns of the result

of all such elections for members of the legislature shall be the same as those prescribed in the Act of Congress entitled "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," approved May seventh, nineteen hundred and six, and all the provisions of said Act which are applicable are extended to said elections for members of the legislature, and shall govern the same, and the canvassing board created by said Act shall canvass the returns of such elections and issue certificates of election to each member elected to the said legislature; and all the penal provisions contained in section fifteen of the said Act shall apply to elections for members of the legislature as fully as they now apply to elections for Delegate from Alaska to the House of Representatives.

SEC. 6. CONVENING AND SESSIONS OF LEGISLATURE.—*That the Legislature of Alaska shall convene at the capitol at the city of Juneau, Alaska, on the first Monday in March in the year nineteen hundred and thirteen, and on the first Monday in March every two years thereafter; but the said legislature shall not continue in session longer than sixty days in any two years unless again convened in extraordinary session by a proclamation of the governor, which shall set forth the object thereof and give at least thirty days' written notice to each member of said legislature, and in such case shall not continue in session longer than fifteen days. The gov-*

ernor of Alaska is hereby authorized to convene the legislature in extraordinary session for a period not exceeding fifteen days when requested to do so by the President of the United States, or when any public danger or necessity may require it.

SEC. 7. ORGANIZATION OF THE LEGISLATURE.—

That when the legislature shall convene under the law, the senate and house of representatives shall each organize by the election of one of their number as presiding officer, who shall be designated in the case of the senate as “president of the senate” and in the case of the house of representatives as “speaker of the house of representatives,” and by the election by each body of the subordinate offices provided for in section eighteen hundred and sixty-one of the United States Revised Statutes of eighteen hundred and seventy-eight, and each of said subordinate officers shall receive the compensation provided in that section: *Provided*, That no person shall be employed for whom salary, wages, or compensation is not provided in the appropriation by Congress.

SEC. 8. ENACTING CLAUSE—SUBJECT OF ACT.

—That the enacting clause of all laws passed by the legislature shall be “Be it enacted by the Legislature of the Territory of Alaska.” No law shall embrace more than one subject, which shall be expressed in its title.

SEC. 9. LEGISLATIVE POWER.—LIMITATIONS.—

The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsist-

ent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents; nor shall the legislature grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the affirmative approval of Congress; nor shall the legislature pass local or special laws in any of the cases enumerated in the Act of July thirtieth, eighteen hundred and eighty-six; nor shall it grant private charters or special privileges, but it may, by general act, permit persons to associate themselves together as bodies corporate for manufacturing, mining, agricultural, and other industrial pursuits, and for the conduct of business of insurance, savings banks, banks of discount and deposit (but not of issue), loans, trust, and guaranty associations, for the establishment and conduct of cemeteries, and for the construction and operation of railroads, wagon roads, vessels, and irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association, but the authority embraced in this section shall only permit the organization of corporations or associations whose chief business shall be in the Territory of Alaska; no divorce shall

be granted by the legislature, nor shall any divorce be granted by the courts of the Territory, unless the applicant therefor shall have resided in the Territory for two years next preceding the application, which residence and all causes for divorce shall be determined by the court upon evidence adduced in open court; nor shall any lottery or the sale of lottery tickets be allowed; nor shall the legislature or any municipality interfere with or attempt in anywise to limit the Acts of Congress to prevent and punish gambling, and all gambling implements shall be seized by the United States marshal or any of his deputies, or constable or police officer, and destroyed; nor shall spirituous or intoxicating liquors be manufactured or sold, except under such regulations and restrictions as Congress shall provide; nor shall any public money be appropriated by the Territory or any municipal corporation therein for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the government, nor shall the Government of the Territory of Alaska or any political or municipal corporation or subdivision of the Territory make any subscription to the capital stock of any incorporated company, or in any manner lend its credit for the use thereof; nor shall the Territory, or any municipal corporation therein, have power or authority to create or assume any bonded indebtedness whatever; nor to borrow money in the name of the Territory or of any municipal division

thereof; nor to pledge the faith of the people of the same for any loan whatever, either directly or indirectly; nor to create, nor to assume, any indebtedness, except for the actual running expenses thereof; and no such indebtedness for actual running expenses shall be created or assumed in excess of the actual income of the Territory or municipality for that year, including as a part of such income appropriations then made by Congress and taxes levied and payable and applicable to the payment of such indebtedness and cash and other money credits on hand and applicable and not already pledged for prior indebtedness: *Provided*, That all authorized indebtedness shall be paid in the order of its creation, *all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof*. No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of two per centum of the assessed valuation of property within the town in any one year; *Provided*, That the Congress reserves the exclusive power for five years from the date of the approval of this Act to fix and impose any tax or taxes upon railways or railway property in Alaska, and no acts or laws passed by the Legislature of Alaska providing for a county form of government therein shall have any

force or effect until it shall be submitted to and approved by the affirmative action of Congress; and all laws passed, or attempted to be passed, by such legislation in said Territory inconsistent with the provisions of this section shall be null and void: *Provided further*, That nothing herein contained shall be held to abridge the right of the legislature to modify the qualifications of electors by extending the elective franchise to women.

SEC. 10. RULES, QUORUM, AND MAJORITY.—That the senate and house of representatives shall each choose its own officers, determine the rules of its own proceedings not inconsistent with this Act, and keep a journal of its proceedings; that the ayes and noes of the members of either house on any question shall, at the request of one-fifth of the members present, be entered upon the journal; that a majority of the members to which each house is entitled shall constitute a quorum of such house for the conduct of business, of which quorum a majority vote shall suffice; that a smaller number than a quorum may adjourn from day to day and compel the attendance of absent members, in such manner and under such penalties as each house may provide; that for the purpose of ascertaining whether there is a quorum present the presiding officer shall count and report the actual number of members present.

SEC. 11. LEGISLATOR SHALL NOT HOLD OTHER OFFICE.—That no member of the legislature shall hold or be appointed to any office which has been

created, or the salary or emoluments of which have been increased, while he was a member, during the term for which he was elected and for one year after the expiration of such term; and no person holding a commission or appointment under the United States shall be a member of the legislature or shall hold any office under the government of said Territory.

SEC. 12. EXEMPTIONS OF LEGISLATORS. — That no member of the legislature shall be held to answer before any other tribunal for any words uttered in the exercise of his legislative functions. That the members of the legislature shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during their attendance upon the sessions of the respective houses, and in going to and returning from the same: *Provided*, That such privilege as to going and returning shall not cover a period of more than ten days each way, except in the second division, when it shall extend to twenty days each way, and the fourth division to fifteen days each way.

SEC. 13. PASSAGE OF LAWS.—That a bill in order to become a law shall have three separate readings in each house, the final passage of which in each house shall be by a majority vote of all the members to which such house is entitled, taken by ayes and noes, and entered upon its journal. That every bill, when passed by the house in which it originated or in which amendments thereto shall have originated,

shall immediately be enrolled and certified by the presiding officer and the clerk and sent to the other house for consideration.

SEC. 14. THE VETO POWER.—That, except as herein provided, all bills passed by the legislature shall, in order to be valid, be signed by the governor. That every bill which shall have passed the legislature shall be certified by the presiding officers and clerks of both houses, and shall thereupon be presented to the governor. If he approves it, he shall sign it and it shall become a law at the expiration of ninety days thereafter, unless sooner given effect by a two-thirds vote of said legislature. If the governor does not approve such bill, he may return it, with his objections, to the legislature. He may veto any specific item or items in any bill which appropriates money for specific purposes, but shall veto other bills, if at all, only as a whole. That upon the receipt of a veto message from the governor each house of the legislature shall enter the same at large upon its journal and proceed to reconsider such bill, or part of a bill, and again vote upon it by ayes and noes which shall be entered upon its journal. If, after such reconsideration, such bill or part of a bill shall be approved by a two-thirds vote of all the members to which each house is entitled, it shall thereby become a law. That if the governor neither signs nor vetoes a bill within three days (Sundays excepted) after it is delivered to him, it shall become a law without his signature, unless the legislature adjourns

sine die prior to the expiration of such three days. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature, by its adjournment, prevents the return of the bill, in which case it shall not be a law.

SEC. 15. PAYMENT OF LEGISLATIVE EXPENSES.—That there shall be annually appropriated by Congress a sum sufficient to pay the salaries of members and authorized employees of the Legislature of Alaska, the printing of the laws, and other incidental expenses thereof; the said sums shall be disbursed by the Governor of Alaska, under sole instructions from the Secretary of the Treasury, and he shall account quarterly to the Secretary for the manner in which the said funds shall have been expended; and no expenditure, to be paid out of money appropriated by Congress, shall be made by the governor or by the legislature for objects not authorized by the Acts of Congress making the appropriations, nor beyond the sums thus appropriated for such objects.

SEC. 16. LAWS TRANSMITTED TO PRESIDENT AND PRINTED.—That the Governor of Alaska shall, within ninety days after the close of each session of the Legislature of the Territory of Alaska, transmit a correct copy of all the laws and resolutions passed by the said legislature, certified to by the secretary of the Territory, with the seal of the Territory attached; one copy to the President of the United States;

and one to the Secretary of State of the United States; and the legislature shall make provisions for printing the session laws and resolutions within ninety days after the close of each session and for their distribution to public officials and sale to the people of the Territory.

SEC. 17. ELECTION OF DELEGATES.—That after the year nineteen hundred and twelve the election for Delegate from the Territory of Alaska, provided by “An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska,” approved May seventh, nineteen hundred and six, shall be held on the Tuesday after the first Monday in November, in the year nineteen hundred and fourteen, and every second year thereafter on the said Tuesday next after the first Monday in November, and all of the provisions of the aforesaid Act shall continue to be in full force and effect and shall apply to the said election in every respect as is now provided for the election to be held in the month of August therein: *Provided*, That the time for holding an election in said Territory for Delegate in Alaska to the House of Representatives to fill a vacancy, whether such vacancy is caused by failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by an act passed by the Legislature of the Territory of Alaska: *Provided further*, That when such election is held it shall be governed in every respect by the laws passed by Congress governing such election.

SEC. 18. CREATING RAILROAD COMMISSION.—

That an officer of the Engineer Corps of the United States Army, a geologist in charge of the Alaska surveys, an officer in the Engineer Corps of the United States Navy, and a civil engineer who has had practical experience in railroad construction and has not been connected with any railroad enterprise in said Territory be appointed by the President as a commissions hereby authorized and instructed to conduct an examination into the transportation question in the Territory of Alaska; to examine railroad routes from the seaboard to the coal fields and to the interior and navigable waterways; to secure surveys and other information with respect to railroads, including cost of construction and operation; to obtain information in respect to the coal fields and their proximity to railroad routes; and to make report of the facts to Congress on or before the first day of December, nineteen hundred and twelve, or as soon thereafter as may be practicable, together with their conclusions and recommendations in respect to the best and most available routes for railroads in Alaska which will develop the country and the resources thereof for the use of the people of the United States: *Provided further*, That the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated to defray the expenses of said commission.

SEC. 19. That the Committee on Territories of

the Senate and the Committee on Territories of the House of Representatives are hereby authorized, empowered, and directed to jointly codify, compile, publish, and annotate all the laws of the United States applicable to the Territory of Alaska, and said committees are jointly authorized to employ such assistance as may be necessary for that purpose; and the sum of five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to cover the expenses of said work, which shall be paid upon vouchers properly signed and approved by the chairman of said committees.

SEC. 20. LAWS SHALL BE SUBMITTED TO CONGRESS.—That all laws passed by the Legislature of the Territory of Alaska shall be submitted to the Congress by the President of the United States, and, if disapproved by Congress, they shall be null and of no effect.

Approved, August 24, 1912.

In the year 1915, the Territorial Legislature passed a revenue bill reading as follows: (The pertinent portions are in Italics)

AN ACT to establish a system of taxation, create revenue and provide for collection thereof, for the Territory of Alaska, and for other purposes; and to amend “An Act to establish a system of taxation, create revenue, and provide for collection thereof for the Territory of Alaska, and for other purposes,” approved May 1, 1913, and declaring an emergency.

*BE IT ENACTED BY THE LEGISLATURE OF
THE TERRITORY OF ALASKA.*

Section 1. That any person, firm or Corporation prosecuting or attempting to prosecute any of the following lines of business in the Territory of Alaska shall apply for and obtain a license and pay for said license for the respective lines of business as follows:

1st. Attorneys at Law, Doctors and Dentists: Ten dollars per annum.

2nd. Automobiles: Five dollars per annum.

3rd. Bakeries: Fifteen dollars per annum.

4th. Electric Light and Power Plants selling light and power to the public: One-half of 1 per cent. of the gross receipts in excess of twenty-five hundred dollars.

5th. Employment Agencies: Operating for hire and collecting a fee from employees, five hundred dollars per annum.

6th. Fisheries: Salmon canneries, four cents per case on King and Reds or Sockeye; two cents per case on Medium Reds or Sockeye; one cent per case on all others.

7th. Salteries: Two and one-half cents per one hundred pounds on all fish salted or mild cured, except herring.

8th. Fish Traps: fixed or floating, one hundred dollars per annum. So called dummy traps included.

9th. Gill Nets: One dollar per hundred fathoms or fraction thereof.

10th. Cold Storage Fish Plants: Doing business of one hundred thousand dollars per annum or more, five hundred dollars per annum; doing a business of seventy-five thousand dollars per annum, and less than one hundred thousand dollars, three hundred and seventy-five dollars per annum; doing a business of fifty thousand and less than seventy-five thousand dollars per annum, two hundred and fifty dollars per annum; doing a business of twenty-five thousand and less than fifty thousand dollars per annum, one hundred and twenty-five dollars per annum; doing a business of ten thousand dollars and less than twenty-five thousand dollars per annum, fifty dollars per annum; doing a business of four thousand, and less than ten thousand dollars per annum, twenty-five dollars per annum; doing a business of under four thousand dollars per annum, ten dollars per annum. The "Annual Business" under this section shall be considered the amount paid per annum for the product.

11th. Laundries: Doing a business of over five thousand dollars per annum, twenty-five dollars per annum.

12th. Meat Markets: Doing a business of not less than ten thousand nor more than twenty-five thousand dollars per annum, ten dollars per annum; doing a business of not less than twenty-five thousand nor more than fifty thousand dollars per annum,

thirty dollars; doing a business of not less than fifty thousand dollars nor more than seventy-five thousand dollars per annum, one hundred dollars per annum; doing a business of not less than seventy-five thousand nor more than two hundred thousand dollars per annum, two hundred and fifty dollars per annum; doing a business of over two hundred thousand dollars per annum, five hundred dollars per annum. That every separate meat market or establishment shall be considered a separate business.

13th. Mining: One per cent. of the net income in excess of five thousand dollars. By "net income" is meant the cash value of the output of the mine less operating expenses, repairs and betterment actually done. By "Mining" is meant any operation by which valuable metals, ores, minerals or marketable stone is extracted from the earth.

14th. Public Scavengers: Fifty (\$50.00) dollars per annum.

15th. Ships and Shipping: Freight and Transportation Ocean and Coast-wise Vessels doing business for hire plying in Alaska waters, registered in Alaska and not registered elsewhere in the United States and not paying a tax or license elsewhere, and freight and passenger lines propelled by mechanical power registered in the Territory of Alaska and not paying a license or tax elsewhere in the United States, and river and lake steamers and barges as well as transportation lines doing business wholly within the Territory of Alaska, one dollar per ton on

net tonnage, custom house measurement of such vessel.

16th. Telephone Companies: One-half of one per cent. of gross receipts in excess of Fifteen (\$1,500.00) Hundred Dollars.

17th. Water Works: Selling water or power to the public, one-half of one per cent. of gross receipts in excess of Twenty-five (\$2500.00) Hundred Dollars.

18th. Public Messengers: Twenty-five (\$25.00) dollars per annum.

Section 2. Every person, firm or corporation desiring to engage in any of the lines of business specified in Section One, shall first apply to and obtain from the Territorial Treasurer a license. If the tax for the license applied for is a fixed sum, the amount of such license tax shall accompany the application. If the amount of the tax is not a fixed sum, the applicant shall state in his application that he agrees to pay the license tax, and will make a true return and will pay to the Treasurer such tax on or before the 15th day of the next ensuing January. The applicant shall also state that the name of the person, firm or corporation making the application, the line of business to be licensed, and the place where said business will be carried on. Upon receipt of the application in proper form, the Treasurer shall issue the license as of the date of the application, and the applicant may carry on the business from and after the date the application is actually made. All

license taxes, except those where the tax is a fixed one, shall be due and payable on December 31st of each year, and must be paid on or before January 15th following. And it shall be the duty of the person, firm or corporation engaged in any of said lines of business, to make a return under oath, to the Treasurer on or before January 15th of each year, setting forth the name of the license, the number of the license, and all the facts regarding the business, necessary to enable the Treasurer to determine the amount of the tax to be paid. And all applications for renewals of such licenses shall be made on or before January 15th of the calendar year for which such renewal is made.

Provided: Any person, firm or corporation now engaged in any of the lines of business specified in Section one shall comply with this Act or before July 1st, 1915, by applying for the license (and paying the tax if a fixed sum) for the calendar year ending December 31st, 1915, and all taxes for the current year shall be calculated for the year beginning January 1st, and ending December 31st, 1915.

Any person, firm or corporation violating any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of the amount of the tax with ten per cent added, for which the defendant was liable. Each month or fraction of a month in which business is carried on in violation of this Act shall be deemed a separate offense, and prosecution there-

for may be by information filed by the Attorney-General or other authorized legal counsel of the Territory in any court of competent jurisdiction, and upon conviction of the Court shall enter a judgment for the fine and costs incurred, and such judgment may be enforced as judgments in civil actions or by imprisonment at the rate of one day for each two dollars of such fine and costs. PROVIDED: That in any prosecution hereunder the Attorney-General or other authorized legal counsel of the Territory may, with the consent of the Governor, compromise the case by accepting from the defendant a sum not less than the tax, legal interest thereon and all costs and expenses.

The Territorial Treasurer is authorized and directed to prescribe suitable form for applications, licenses, returns and such other forms as may be necessary or proper to carry this law into effect. He shall distribute such forms to the public through the Clerks' of the Court and Marshal's offices in the several Divisions for use of those subject to the taxes herein laid.

Section 3. It shall be the duty of the Attorney-General or other authorized legal counsel of the Territory to enforce the provisions of this Act; and for that purpose, may with the approval of the Governor, employ such assistants as he may deem necessary, but the compensation for the service of such assistants shall be paid out of the fund recovered, and the Territory shall not be liable therefor in any event be-

yond fifteen (15) per cent. of the amount so recovered in each case; assistant counsel may, however, be employed at a previously agreed upon and stipulated fixed fee.

Section 4. Special remedies provided by this Act, or other Acts of the Legislature shall not be deemed exclusive, and any appropriate remedy either civil or criminal or both, may be involved by the Territory in the collection of all taxes, and in civil actions the same penalties may be collected, as are herein provided in criminal actions.

Section 5. All taxes levied, laid or provided for in this Act and penalties and interest accrued, are hereby declared to be a lien upon the real and personal property of the person, firm or corporation liable therefor, paramount and superior to all mortgages, hypothecations, conveyances and assignments.

Section 6. It shall be the duty of the United States Marshals and Deputy Marshals in the Territory of Alaska to enforce the provisions of this Act in their respective precincts, districts or divisions and to report all violations thereof to the Governor, and under his direction file information, or take such proceedings as he may direct; and for the services so performed they shall be paid under the provisions of Section three hereof. And for all negligence or wilful failure to perform such duties, Marshals and Deputy Marshals shall be liable to the Territory for all losses sustained, which liabilities may be enforced in any appropriate proceeding. And in the enforce-

ment of this Act the Attorney-General or other legal counsel for the Territory and the Marshals and Deputy Marshals have the right to inspect the premises and all books and papers of the persons, firms or corporations claimed to be liable to the taxes herein laid, which right of inspection shall be enforced by the Courts upon application therefor.

Section 7. The Act of which this Act is an amendment is hereby repealed, except in so far as the same is hereby re-enacted, but nothing herein contained shall be construed to relieve any person, firm or corporation from the payment of any tax, penalty and interest accrued and owing under the Act of which this Act is an amendment, but all such taxes, penalties and interest shall be paid, or collected and enforced in the same manner as taxes herein provided for are collected and enforced.

Section 8. An emergency is hereby declared to exist and this Act shall be in full force and effect from and after its passage and approval.

Approved, April 29, 1915.

This Act was passed by the Legislature on the 61st day after it had gone into session at between 3 and 4 o'clock in the morning, sun time, while the clocks in both houses indicated an hour prior to 12 o'clock, these having been stopped or turned back to so indicate.

The plaintiff in error owns and operates three salmon canneries in Southeastern Alaska. Some of the Salmon Canneries in Alaska are so situated, ow-

ing to natural conditions, that the salmon canned are caught by the use of seines, while others are so situated that seines cannot be used but fish traps must be employed for that purpose. The salmon canneries, of the plaintiff in error are so situated that it is obliged to employ fish traps in order to catch the salmon required at its canneries for canning purposes. All of plaintiff in error's canneries were operated by it during the year 1915 and during that season 19 fish traps were employed in catching the salmon canned by it at its canneries. None of the fish caught in any of these traps was sold until after it was canned. The plaintiff in error made no other use of its fish traps and paid its license taxes under the Act of June 1906, but did not apply for or take out a license under the territorial Act of 1915.

This action was brought to recover \$1900.00 claimed to be due the Territory as taxes on account of the employment by the plaintiff in error of the 19 fish traps as related. Judgment was entered for the Territory in the amount sued for.

The cause was submitted to the lower court upon an agreed statement of facts and the only matters presented for review relate, first to the question as to whether the act of 1915 is a valid law, it being contended that this act is in so far as it relates to the facts in this case obnoxious to the provisions of the Organic Act of the Territory and also to the provisions of the Constitution of the United States, second, to the question of whether the plaintiff in error un-

der the facts as stated, became liable to the Territory for taxes because of the provisions in the Act of 1915 in so far as they relate to fish traps, and third, to the further question of whether in any event, it could be held so liable in view of the fact that the fish traps were mere appliances used in connection with the salmon canning business for which a license tax was required and paid in lieu of all other taxes and licenses under the provisions of the act of June, 1906.

ERRORS ASSIGNED AND RELIED UPON.

The following errors are assigned and relied upon for a reversal of the judgment:

First, That the court erred in overruling the demurrer of the defendant to the plaintiff's complaint.

Second, That the District Court for the Territory of Alaska, Division Number One, erred in failing and refusing at the request of the plaintiff in error, The Alaska Pacific Fisheries, to conclude as a matter of law from the facts found and to adopt as its conclusion of law Conclusion of Law No. 1 as requested by the defendant, which is in words and figures as follows:

“Conclusion of Law No. 1, as Requested
by Defendant.

That the Act of the Territorial Legislature of the Territory of Alaska entitled, ‘An Act to establish a system of taxation, create revenue,

and provide for the collection thereof for the Territory of Alaska and for other purposes, and to amend an act entitled, “ ‘An Act to establish a system of taxation, create revenue and provide for the collection thereof for the Territory of Alaska and for other purposes, approved May 1, 1913, and declaring an emergency’ ”, which said act was approved May 29, 1915, and forms the basis of this action is inoperative, invalid and void, as far as it relates to the facts in this case.”

Third, That the District Court, for the Territory of Alaska, Division Number One, erred in failing and refusing at the request of the plaintiff in error, The Alaska Pacific Fisheries, to conclude as a matter of law from the facts found and to adopt as its Conclusion of Law, Conclusion of Law No. 2 as Requested by Defendant, which is in words and figures as follows:

“That the defendant is not indebted to the plaintiff in any sum whatsoever, and that the complaint should be dismissed and the plaintiff recover nothing by reason thereof.”

Fourth, That the District Court, for the Territory of Alaska, Division Number One, error in failing and refusing at the request of the plaintiff in error, The Alaska Pacific Fisheries, to conclude as a Matter of Law from the facts found and to adopt as its Conclusion of Law Conclusion of Law No. 3, as

Requested by the Defendant, which is in words and figures as follows:

“That the defendant should have judgment against the plaintiff for its costs and disbursements in this behalf incurred.”

Fifth, That the District Court, for the Territory of Alaska, Division Number One, erred in adopting as its Conclusion of Law and in concluding from the facts stipulated and found, as follows:

“And from the foregoing facts and stipulation the court concludes as a matter of law that the plaintiff is entitled to judgment for the sum of \$1963.00 and costs.”

Sixth, That the District Court, for the Territory of Alaska, Division Number One, erred in rendering Judgment herein for the Plaintiff in the sum specified or in any sum whatsoever.

ARGUMENT

All of the errors assigned raise practically the same questions and can therefore be discussed together. The first question presented relates to the validity of the Act of 1915 as determined by the provisions of the Organic Act and those of the constitution of the United States. The second question presented is whether the provisions of the act of 1915 relating to fish traps are such as would require the plaintiff in error to apply for and obtain a license under the facts in the case. The third question deals with the liability of the plaintiff in error in view of the fact that its fish traps were used as appliances employed in connection with the canning business, for the conduct of which the act of June, 1906, required a license, which it is provided shall be in lieu of all other licenses and taxes. These will be discussed in their order.

1.

THE VALIDITY OF THE ACT OF 1915 IN VIEW OF THE LIMITATIONS PLACED UPON THE POWER OF THE LEGISLA- TURE BY THE ORGANIC ACT AND THE CONSTITUTION.

(a) In the Light of the Organic Act

The act purports to be a revenue act designed to raise revenue by requiring the payment of a fixed sum in each of the enumerated cases for a license.

It is entitled "An Act to establish a system of taxation, create revenue and provide for the collection thereof etc." Section one provides "That any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in the Territory of Alaska shall apply for and obtain a license and pay for said license for the respective lines of business as follows:

8th. Fish Traps: Fixed or floating one hundred dollars per annum. So called dummy traps included."

In order to consider the validity of the act in so far as it relates to the matters in dispute it is necessary to ascertain the meaning of the language employed, in so far as it relates to such matters. That the sole object of the act is the collection of revenue is not disputed. It is conceded that the amount sued for is sought to be recovered as taxes due under the provisions of the act. It remains to be seen, however, whether the tax sought to be collected is a specific tax on property or a tax on a business generally referred to as a license tax. It is obvious that the tax is not an *ad valorem* tax, but belongs to one or the other of the two classes named. Its validity will therefore be considered from both view points:

(a 1.) Viewed As a Specific Property Tax.

Whatever power is possessed by the Territorial Legislature of Alaska is derived from the Organic Act. Congress has under the constitution plenary power to legislate for the territories. It may either

exercise this power or it may delegate it in whole or in part to a territorial legislature. In the case of Alaska it has in part only delegated its powers in this regard to the Legislature of the Territory by the Organic Act.

The Organic Act of a territory is a grant of legislative powers. In that respect it does not differ from the charter of a municipal corporation or the constitution of the United States. Such grants are always strictly construed. No power passes except such powers as are either expressly conferred or are conferred by necessary implication. The powers expressly conferred are those that are stated in express terms. The powers conferred by necessary implication are limited to such as may be necessary to carry into effect the powers expressly granted.

Every sovereign power has the inherent right to collect revenues since this right is necessary to its existence. The territory of Alaska, however, is not a sovereign power so as to be endowed with this inherent power. It is a mere territory of the United States and its legislature is the creature of the congress; like other legislative bodies similarly created it is endowed with such powers only as are conferred upon it.

The Organic Act contains a provision similar to the general welfare causes ordinarily contained in the charters of municipal corporations. This provision reads as follows:

“The Legislative powers of the Territory shall

extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States."

Under it the power to raise revenues by means of taxation is in a general way, subject to the limitation elsewhere imposed, conferred; but since legislative grants are strictly construed, the powers thus conferred in a general way must be exercised in strict conformity with the specific requirements of the Organic Act itself and in strict subordination to the limitations imposed.

The Organic Act contains the following provision: "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof.

It will be observed that under this provision all taxes must be uniform and must be assessed according to value. Viewed as a specific tax on property the tax in question fails to comply with the provision quoted in that it is not assessed according to value. Each fish trap including dummy traps being taxed \$100 regardless of its value. In this connection it may be observed that it was agreed (see record p. 24) that some of the traps of the plaintiff in error were worth as much as \$10,000.00 while others did not exceed \$1000 in value. The tax therefore if considered as a tax on the fish traps must be regarded as not being assessed according to actual value in direct violation of the provisions of the Organic Act.

That it was the intention of the legislature to lay a specific property tax on fish traps becomes apparent when the language employed is considered. Any other construction would not only make the meaning of the provision so uncertain as to render it void on that account, but would do violence to the language itself. The act provides that those engaging in the following lines of business shall pay a license tax, then follows an enumeration which includes the following: "8th: Fish Traps: Fixed or floating one hundred dollars per annum. So called dummy traps included." Now a fish trap is not a line of business, but a device employed in catching fish. A fish trap is tangible property and the fact that it is enumerated as a line of business does not make it such.

The learned trial Judge expressed the opinion that what the legislature meant was, quoting from the opinion, "that whoever conducts the business of fishing by means of fish traps must pay the license required." Not only is there no reason for asserting that this is what the legislature meant to say, but upon examining the act it will be seen that this is the one thing the legislature did not mean to say. The act provides that there shall be paid for each fish trap, whether fixed or floating, the sum of one hundred dollars per annum—so called dummy traps included. It does not matter whether the trap is fixed or floating nor does it matter whether the trap is a dummy trap or one used to catch fish, the tax is the same in any case.

Now dummy traps are not used to catch fish, they are as the name indicates mere dummies. The learned trial Judge, in the opinion, correctly and clearly defines a dummy trap as follows: "A dummy trap is a sham trap not used for fishing but designed simply to squat on and hold a trap location." The owners of dummy traps may not be engaged in the business of fishing at all. They may be persons engaged in seeking out and locating by means of dummy traps favorable trap locations with a view of selling these locations to persons engaged in fishing. Yet under the act they would be obliged to pay the tax of one hundred dollars on each dummy trap. The fact that a tax is required on a trap not used in fishing shows clearly that the tax was not intended to be imposed on the business of fishing by means of traps because these traps cannot be so employed.

The learned trial Judge disposed of this matter by saying that it was immaterial whether the tax imposed on dummy traps was a valid tax, since the traps referred to in the cause on trial were not dummy traps. This however is no reply to the argument advanced. Reference is not here had to dummy traps for the purpose of ascertaining whether the tax on these traps is a valid one, but for the purpose of ascertaining the intention of the legislature in taxing fish traps generally. Dummy traps are placed in the same class with other traps and the character of the tax imposed on dummy traps is the same as

that of the tax imposed on other traps. Hence, since the legislature could not intend the tax imposed on dummy traps to be a tax on the business of fishing with dummy traps as the latter cannot be employed in fishing, the legislature did not intend the tax on other fish traps to be a tax on the business of fishing therewith.

Again under the construction placed on the act by the learned trial Judge the line of business sought to be taxed is changed from the fish trap business or the business of "fish traps" to the business of fishing; that this construction is not in accord with the legislative intent is evident from the fact that the 6th line of business enumerated is that of the fisheries. If this tax had been intended as a tax on the fisheries it would have been dealt with under that head. Nor does it seem reasonable that the legislature intended to impose two separate taxes on the fisheries at least not by a single enactment.

Independent of these considerations there is not as much reason for saying that the fish trap business means the business of fishing by means of fish traps as there would be for saying that it means the business of trading in or buying and selling fish traps, or the business of building fish traps or the business of designing or inventing new kinds of fish traps or any other business that relates to fish traps.

In common parlance the business of fishing with fish traps would be referred to as the fishing business, while the phrase fish trap business would be

applied to one engaged in the business of buying and selling or trading in fish traps. Similar phraseology is frequently employed and the meaning attached thereto is always the same. Thus if one were referred to as being in the farm implement business no one would take it that such a one was engaged in farming by means of farm implements, but all would at once know that such a one was a dealer in farm implements. So one engaged in the horse business is one engaged in buying and selling horses, not one who carries on this or that business in which horses are employed. Many other instances where this phrase is commonly employed readily suggest themselves, and in every case reference is had to one buying or selling the thing the name of which is thus connected with the word business.

Whatever else may be said upon this subject, this much is certain that unless the tax be regarded as a specific tax on property, the whole matter becomes involved in a maze of uncertainty. The legislature cannot have had reference to the business of fishing with fish traps as dummy traps are classed with the others and dummy traps cannot be used in fishing, but just what the legislature referred to no one can tell. Many lines of business relate in one way or another to fish traps and the term fish trap business fits one almost as well as it does any of the others. A consideration of the whole law makes it clear that the legislature intended to place a specific property tax on fish traps of one hundred

dollars each regardless of whether the traps were used in catching fish or not. An attempt to place any other construction upon the act merely leads to confusion and is unwarranted by the language employed.

Nor would the construction contended for by the learned trial Judge help the matter out any. If that construction were adopted the tax sought to be collected would still remain a specific tax on property. To say that those engaged in the business of fishing by means of fish traps shall pay a tax of one hundred dollars on each trap, does not change the character of the tax from a tax on the fish trap as property to a tax on the business of fishing by means of fish traps, as a business. It merely limits the persons liable to pay a tax on fish traps to those engaged in fishing by means of such traps. The tax still remains a specific property tax on fish traps to be paid only by those employing such traps in connection with the fishing business. The tax does not become a tax on the business but remains a tax on the traps at the rate of one hundred dollars for each trap. To say that one engaged in a given business shall pay a fixed tax on part or all the property used in connection with the conduct of such business does not relieve the tax imposed of its character as a tax on property. If this would result one engaged in farming by the use of horses could be taxed at a fixed rate per horse regardless of its value or any farmer could be taxed at a fixed rate per acre of land farmed regardless of

its value. A railroad company engaged in the transportation business by means of cars and locomotives could be taxed at a fixed rate for each car or locomotive regardless of its value. In fact all the tools, implements and appliances used or employed in connection with the various industrial pursuits could in this manner be taxed without regard to their value. Indeed every species of property could in this manner be subjected to a specific tax levied without regard to the value of the thing taxed, except only such property as is not used or employed for any purpose whatever. No property would be protected by the provisions in the organic law that all taxation shall be according to value, except property that is absolutely useless. A theory that leads to such conclusions cannot be regarded as sound. Regardless of the angle from which this tax is viewed, therefore, it is and remains a specific tax on property.

The view taken by the Supreme Court of the United States, however, concerning the nature and effect of license taxes makes it a matter of very little importance whether this is a direct tax on property or a tax on the business in which the property is employed. That court held that a tax on the business of a peddler selling goods of a given character must be regarded as a tax on the goods sold by such peddler. It would follow therefore that a tax on the business of fishing by means of fish traps must be regarded as a tax on the fish traps employed in such business.

Welton v. State of Missouri, 91 U. S. 278. The state of Missouri passed a law exacting a license from peddlers selling merchandise manufactured outside of the state. This act was held to be an interference with interstate commerce and void. It was urged that the license tax was required from the peddler and was not a duty imposed upon the goods he sold; that the goods were the subject of interstate commerce and not the peddler, that for this reason the license tax did not interfere with interstate commerce, but the court held that a license tax exacted for the sale of goods was in effect a tax upon the goods themselves. In passing upon this question, Mr. Justice Fields, speaking for the Court, says:

“The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the State; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the State.

The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the

goods, or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license."

While the state courts have held that license taxes on business were not property taxes, they have uniformly held that where a business was taxed and the amount of the tax was measured by the property employed, the tax could not be regarded as a license tax on business but must be regarded as a tax on property.

Standard Oil Company v. Commonwealth, 82 S. W. 1020.

Pittsburg, Cincinnati & St. Louis Railroad Co. v. State Ohio, 30 N. E. 435.

Pittsburg Railroad Co. v. Pittsburg, 60 Atl. 1080.

City Brookfield v. Toory, 43 S. W. 387.

Ellis v. Frazier, 63 Pac. 642.

The case of *Standard Oil Company v. Commonwealth* arose in the State of Kentucky. The legislature of that state had passed a law, in all respects like the Alaska Statute now before the court. Subdivision 4 of Article 10 of the chapter of the Kentucky statute relating to revenue and taxation, under the head of "Amount of License Tax" enumerated a large number of occupations, etc., which were required to pay a license tax and in this enumeration occurred the following: "to each oil depot in this state wherein petroleum, lubricating or other oils are stored in bulk or tank, ten dollars."

The constitution of the state of Kentucky contained a provision requiring all property taxes to be assessed according to value, but allowing the imposition of license taxes. (The full text of the constitutional provisions relating to this subject is elsewhere set out in this brief.) The question therefor arose whether this was a license tax or a property tax. If a property tax the constitution required it to be according to value. If a license tax it might stand since the constitution expressly provided that license taxes might be assessed notwithstanding this constitutional requirement. It will be noted that the tax here, as in the case at bar, was designated a license tax and that the language contained in the enumeration of the things on which such a tax was imposed in so far as it related to the oil depots, is in all respects similar to the language relating to fish traps as contained in the Alaska act.

The Supreme Court of Kentucky held that notwithstanding the language of the statute, the tax was a property tax and void because it was not assessed according to value. In passing upon this question the court say: "The imposing of an arbitrary sum of ten dollars as a tax upon each oil depot in this state without regard to their value would be a most palpable violation of these sections of the constitution. It is altogether improbable that every oil depot of the state is of exactly the same value, or if they were, when taxed as property they could not be taxed either a greater or less per cent of their

value than other property subject to taxation is made to bear.”

The case of *Pittsburg, Cincinnati and St. Louis Railroad Company v. State* arose in the state of Ohio. The legislature of that state had passed an act requiring every corporation or company operating a railroad, or any part of a railroad, within the state to pay to the Commissioner of railroads and telegraphs a fee of \$1.00 per mile for each mile of track operated by it within the state. It was contended that this was in fact an exaction of a fee under the police power. The court, after reviewing the decisions of the Supreme Court of Ohio on the subject, held that in Ohio all taxes must conform to the constitutional provisions relating to taxes; that the money exactions not required to conform therewith were those exacted under the police power and those only. It was then held that the exaction in this case was a tax on property notwithstanding the fact that it was called a fee; that it lacked uniformity and was not assessed according to value, as required by the Ohio constitutional provisions, which are elsewhere in this brief set out at length. In passing upon this question the Supreme Court of Ohio says:

“What is this statute? Its constitutionality must be determined by its operation. It provides in terms that there be placed upon each mile of railroad track within this state an exaction of \$1 per annum; the statute calls it a ‘fee,’ but its nature is not affected by the name that may be assigned to it.

It is an exaction levied upon railroad tracks, and railroad tracks are property. It does not differ in principle from a fixed sum, levied upon all the farmers of the state, for each acre of land of which they may be seized, or each head of horses or other live stock that they may own. In both instances the tax is levied upon property, but it is neither levied 'according to its true value in money' nor uniformly upon all property; both of which are constitutional requirements, if it is a tax within the constitutional meaning of that word. That it is such a tax we think there can be little, if any, doubt. A tax is a 'pecuniary burden imposed for the support of the government Burdens or charges imposed by the legislative power of a state upon persons or property to raise money for public purposes.' The money raised by this section under consideration is directed to be paid into the state treasury; it becomes a part of the funds of the state applicable to any conceivable public purpose. There is not a word in the section under consideration, or in the Act to which it is supplementary, to indicate a purpose that the fund shall be limited, or even in any way specially applied, to the expenses incurred in supervising the railroads of the state. A law like this—the direct and only purpose it can accomplish, being to create a fund by an exaction on property to be paid into the state treasury to be used indiscriminately for any and all public purposes—must be regarded as creating a tax."

The case of *Pittsburg Railroad Company v. Pittsburgh* arose in the State of Pennsylvania. The city of Pittsburgh had passed an ordinance entitled, "An Ordinance establishing and levying license taxes for general revenue purposes upon street railways, telephone, telegraph, electric light, or power, water, gas and heat companies or corporations doing business in the City of Pittsburgh, regulating the collection of the same and imposing penalties for default in payment." The ordinance provided among other things, "that there shall be established and levied an annual license tax upon each and every street railway company or corporation the sum of twenty five cents per foot for each lineal foot of track laid, maintained or operated by such company or corporation within the limits of the city of Pittsburgh exclusive of such track as may be in the yards or buildings of such company or corporations."

The city of Pittsburgh had authority to impose license taxes, but the Supreme Court of Pennsylvania held this tax to be a property tax upon the tracks of the railroad companies notwithstanding the fact that it was called a license tax and held the ordinance void. In passing upon this question the Supreme Court of Pennsylvania say: "What the act of the Assembly authorizes the city to levy and collect is a license tax or fee and the ordinances are so worded. They term the tax assessed against the appellee a "license tax"; but no matter what the municipal

authorities call it, the question is, "What is it?" The tax is 25 cents per foot "for each lineal foot of track laid, maintained or operated" by the appellee within the city of Pittsburg exclusive of such tracks as may be in its yards or buildings. The tracks of a street railway company are as much its property as are its power houses, car barns, or repair shops; and if so could it be seriously argued that an annual tax of 25 cents per lineal foot on a car barn would not be a tax on the property no matter by what name called, especially if to be collected for the general revenue purposes of the municipality? Manifestly it would be such a tax and such is the character of the tax which the appellant would impose on the tracks of the appellee."

The case of the City of Brookfield v. Toory was decided by the Supreme Court of Missouri. The city of Brookfield passed an ordinance requiring merchants to pay a license tax the amount of the tax required in each case was one per cent. upon the cash value of the stock of goods, wares and merchandise kept on hand for sale. The tax was held to be a property tax and not a license tax and the ordinance held void because a property tax of this character could not be levied by the city. In passing upon this question, the Supreme Court of Missouri say: "In a word can this tax of one per cent. upon the cash value of the goods on hand be held as an occupation or privilege tax. After a careful investigation of the question mooted and most ably discussed by

counsel, it seems palpable that this is a property tax pure and simple. It is an obvious mis-nomer to call it a tax upon occupation. While cities of the third class may exact a license tax upon occupations or callings the tax thus exacted must be upon the privilege itself and not a plain ad valorem tax upon property as this ordinance levies.”

The case of *Ellis v. Frazier* arose in Oregon. The Legislature of Oregon has passed an act imposing a tax of \$1.25 on bicycles within certain counties. The owner of a bicycle was required to pay \$1.25 in return for which he received a tag to be attached to the bicycle. It was urged that this was a license fee. The court decided that fees exacted under the police power were the only money exactions that were not required to conform to the constitutional provisions of Oregon which require uniformity and require property taxes to be assessed according to value. (The Oregon constitution is quoted at length elsewhere in this brief.) And it was further held that this tax was a property tax and since it was not assessed according to value as required by the constitution, it was void. Several other matters are discussed in this case, but reference to these will be had elsewhere in the brief.

A—2. VALIDITY OF THE TAX WHEN VIEWED AS A LICENSE TAX.

The power of the legislature to levy or collect taxes, does not exist as an inherent power but because of a grant contained in the Organic Act and must, as was said when the validity of specific property taxes was being discussed, be exercised in strict subordination to the provisions in the Organic Act expressly limiting that power.

The act requires that "ALL TAXES SHALL BE UNIFORM UPON THE SAME CLASS OF SUBJECTS AND SHALL BE LEVIED AND COLLECTED UNDER GENERAL LAWS AND THE ASSESSMENTS SHALL BE ACCORDING TO THE ACTUAL VALUE THEREOF." This provision requires all taxes to be uniform upon the same class of subjects, requires all taxes to be levied and collected under general laws and requires all taxes to be assessed according to the value of the thing which is the subject of taxation—under it there must be uniformity, there must be an assessment and the tax must be based upon value. Again, the provision applies to all taxes meaning each and every tax; its effect is nowhere limited to property taxes, nor does it contain an exception in favor of licenses taxes.

The tax in question violates each of these requirements. In the first place it can not in any sense be regarded as uniform upon the same class

of subjects. It was stipulated in this case that the plaintiff in error is operating salmon canneries so situate owing to natural conditions that it is obliged to resort to the use of fish traps to catch its fish supply. It is further stipulated that other canneries in Alaska are so situate because of natural conditions that they catch their fish supply by resorting to the use of seines for that purpose. All these canneries sell their fish in the same market. A tax upon the fish traps imposes a burden on the product. The same thing results if the construction placed upon the act by the learned trial Judge is adopted and the tax is regarded as a license tax imposed upon those engaged in fishing by means of fish traps. In that event the class of subjects on whom the tax is imposed are those engaged in fishing and since seines are not taxed under the act and no tax is imposed on those engaged in fishing by means of seines, those engaged in fishing by means of fish traps are discriminated against in favor of those engaged in fishing by means of seinies.

This precise question came before the Federal court in a case that arose in Nebraska. *Lincoln Gas Co. v. City*, 182 Fed. 927. A license tax was imposed upon a gas company's furnishing light, heat and power to the inhabitants of the City of Lincoln, Nebraska, and a smaller license tax was required from electric light companies furnishing light, heat and power to the citizens of the same city. The court held this tax invalid because it was not

uniform in its operation on the same class of subjects as required by the Nebraska Constitution.

In this connection it must be added that in determining upon the validity of acts of this character the court may consider inequalities that arise as a result of the law when placed in actual operation. This under the authority of the case of *Yick v. Hopkins*, 118 U. S. 635.

Nor does the law comply with the provision that there must be an assessment for no assessment of any kind is provided for. The principle objection, however, to the tax is that it is not assessed according to the value of the thing taxed. Viewed from any standpoint the tax is a specific tax and does not take into consideration at all the value of the thing which is the subject of taxation.

The learned trial Judge, however, was of the opinion that this was a license tax, and that taxes of this character could be levied without complying with the requirements of the provision referred to, notwithstanding the fact that by its express terms "all taxes" without exception are made subject to the requirements mentioned. This view is based upon an erroneous conception of the effect of some of the decisions of the state courts.

These decisions were rendered in states having a variety of constitutional limitations and restrictions upon the taxing power, all unlike the provision contained in the organic law of Alaska. Of course the effect of a limitation contained in the organic

law of any state or territory must depend in each case upon the language of the provision containing the limitation; and the decisions of the courts relating thereto must be read in the light of the language of the provision construed.

By many of the state constitutions license taxes are expressly provided for or excepted from the operation of the requirements of uniformity and assessment according to value. By others the provisions containing these requirements are expressly limited in their application to property taxes. By the organic law of Alaska all taxes, without exception, must comply with the requirements of uniformity and assessment according to value. An examination of the decisions upon which the opinion of the learned trial Judge is based will disclose the fact that they can all be distinguished for one or the other of the reasons given except only those cases which relate to licenses exacted for the purpose of regulation under the police power as distinguished from license taxes exacted for the purpose of revenue under the taxing power. These cases of course rest upon an entirely different principle.

Where in the interest of the public health, the public morals or the public safety it becomes necessary to supervise or regulate an occupation or business, the legislature may require a license from those engaged therein for the purpose of regulating the same, and may in that connection adopt such regulatory provisions as may be necessary, it may

also require the payment of a license fee sufficiently large to pay, ^{the} costs of issuing the license and in addition thereto the costs of supervision and regulation. The fees required to be paid, however, cannot exceed the amount necessary for the purpose mentioned, and must be exacted in good faith to meet the expense of regulation and not for the purpose of raising revenue. In so acting the legislature proceeds under the police power of the state. In the exercise of the police power the legislature is of course not restricted by limitations placed upon the taxing power and it is for that reason that the validity of laws exacting license fees is not effected by provisions in the organic law relating to taxes. Such license fees are not taxes and depend for their validity not upon a compliance with constitutional requirements relating to taxes, but upon the question of whether the regulation in connection with which they are exacted is reasonably necessary to promote the public health, public morals or public safety.

Not so in the case of license taxes. These have nothing to do with the public health, public morals or public safety, in imposing license taxes the object and aim of the legislature is the collection of revenue. In character a license tax does not differ from any other tax. It is levied against the occupation or business of the person called upon to pay it just as a property tax is levied against the property of the person called upon to pay such tax, the object in each case being the production of revenue

for the support of the government. The only difference between a license tax and a property tax lies in the procedure provided for enforcing the collection of the tax.

The collection of a property tax can be enforced by a seizure and sale of the property taxed. Collection of a license tax cannot be thus enforced because of the intangible character of the occupation or business which forms the subject of the tax. The only practical method by which the collection of this tax can be enforced consists in providing that it shall be an offense to pursue the occupation or business taxed without first paying the tax.

The procedure followed is similar to that pursued in the collection of license fees under the police power. A license is required but this license performs no office except that it serves as a receipt for the taxes paid. When a license is granted under the police power it serves as a permit to do that which without the license would be unlawful because of its harmful effect upon the public health, public morals or public safety if permitted to be done without the restraint of the license and proper regulation thereunder—^aright is conferred upon the recipient of the license which he did not have before it was issued. When, however, a license is issued to one in connection with the payment of a license tax no new right is conferred upon the recipient. The occupation or business licensed is not one which requires regulation and restraint in order to prevent

injury to the public health, morals or safety, but is a useful one by which the public health, morals and safety as well as the public welfare are promoted. The recipient of the license had a right under the constitution to follow an occupation or business of this character without a license just as one has the right to the ownership and enjoyment of private property without a license. In exacting the license tax the government merely exercises its right to levy a tax against the occupation or business of the citizen for the purpose of defraying the expense of government, just as it levies a tax against the property of the citizen for such purpose. Nothing more, nothing less. There is no difference between a license tax and a property tax. The apparent difference arises from the fact that in one case the thing taxed is tangible, in the other intangible which necessitates different methods of procedure when it comes to enforcing collection. Both are taxes in every sense of the word and being taxes must conform to the requirement of the organic law as to uniformity and assessment according to value unless, indeed, the provisions containing these requirements differ from those contained in the organic act of Alaska in that they are so worded as to be limited to one or to exclude the other.

There is no similarity between license fees exacted under the police power and license tax exacted under the taxing power, although the method of procedure for their enforcement may be the same.

As was said by Judge Cooley in his work on taxation, page 396, "The distinction between a demand of money, under the police power, and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case, and referring it to the proper power."

It will be seen therefore that the decisions that relate to license fees exacted under the police power have no application to the facts in this case. (Throughout this discussion the nomenclature found in most of the cases upon the subject is followed; that is to say money exactions under the police power are referred to as "license fees" while those under the taxing power are referred to as "license taxes." In some of the cases the terms, license fees, license taxes and occupation taxes are all used, sometimes interchangeably, where money exactions under the police power are referred to.)

The various provisions contained in the organic laws of the various states and territories will next be discussed with a view of determining the applicability and effect of the decisions under each.

The constitution of the State of Alabama contains the following provisions: "All taxes levied on property in this state shall be assessed in exact pro-

portion to the value of such property The legislature shall not enact any law which will permit any person, firm, corporation or association to pay a privilege, license or other tax to the State of Alabama, and relieve him or it from the payment of all other privilege and license taxes in the state."

The constitution of the State of Arkansas provides as follows: "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper."

The constitution of the State of Florida provides as follows: "The legislature shall provide for a uniform and equal rate of taxation and shall prescribe such regulations as shall secure a just valuation of all property The legislature may also provide for levying a special capitation tax and a tax on licenses."

The constitution of the State of Illinois contains the following provisions: "The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the

value of his, her or its property, such value to be ascertained by some person or persons, to be selected or appointed in such manner as the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests, or business, vendors of patents and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates.”

The constitution of the State of Idaho contains the following provisions: “The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, or her, or its property, except as in this article hereinafter otherwise provided. The legislature may also impose a license tax (both upon natural persons and upon corporations, other than municipal, doing business in this state); also a per capita tax All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation of all property, real and personal.”

The Montana Constitution provides as follows: “The necessary revenue for the support and mainte-

nance of the state shall be provided by the Legislative Assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The Legislative Assembly may also impose a license tax, both upon persons and upon corporations doing business in the state."

The constitution of Nebraska contains the following provision: "The Legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the tax to be ascertained in such manner as the Legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct, uniform as to the class on which it operates."

The constitution of the state of Louisiana contains the following provision: "Taxes shall be equal and uniform throughout the limits of the authority levying the tax, and all property shall be taxed in proportion to its value." Provision is also made for a license tax, to be graduated upon persons pursuing the several trades, professions, vocations, and callings. All occupations may be liable to such tax

except those of clerks, laborers, clergymen, school teachers, those engaged in mechanical, horticultural, agricultural, and mining pursuits, and manufacturers, other than those of distilled, alcoholic, or malt liquors, tobacco, cigars, and cottonseed oil.

The constitution of the state of North Carolina provides as follows: "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property And provided, further, That the General Assembly may provide for a graduated tax on incomes, and for a graduated license on occupations and business."

The constitution of the state of Texas contains the following provision: "Taxation shall be equal and uniform. All property in this state, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The legislature may impose a poll-tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this state. It may also tax incomes of both natural persons and corporations, other than municipal, except that persons engaged in mining and agricultural pursuits, shall never be required to pay an occupation tax."

The constitution of the state of Tennessee provides: "All property shall be taxed according to its

value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value, but the Legislature shall have power to tax merchants, peddlers and privileges, in such manner as they from time to time direct.”

The constitution of the state of Utah provides as follows: “The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money Nothing in this constitution shall be construed to prevent the legislature from providing a stamp tax, or a tax based on income, occupation, licenses, franchises, or mortgages.”

The constitution of the state of Virginia provides as follows: “All property, except as hereinafter provided, shall be taxed, all taxes, whether state, local, or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws The General Assembly may levy a tax upon incomes in excess of \$600 per annum; may levy a license tax upon any business which cannot be reached by the ad-valorem system.”

The constitution of the state of West Virginia contains the following provision: “Taxation shall

be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law The Legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations.”

The constitution of the State of Kentucky contains the following provisions: “Taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws. All property shall be assessed at its fair cash value. All property, whether owned by natural persons or corporations shall be taxed in proportion to its value The General Assembly may by general laws only provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions.”

The organic act of the Territory of Oklahoma provides as follows: “Nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to the taxation shall be taxed in proportion to its value: Provided, That nothing herein shall be held to prohibit the levying and collecting license or special taxes in the

territory from persons engaged in any business therein, if the legislative power shall consider such taxes necessary.”

It will be observed that the constitution of each of the states above referred contain express provisions authorizing the collection of license taxes. The language employed varies, but in each case it is clear that the framers of the constitutions intended to authorize the legislature to impose and collect license taxes for the purpose of revenue as distinguished from license fees exacted in connection with the requirement of a license for the purpose of regulation. It is needless to say that the courts in the states above mentioned have uniformly held that the legislature had the power to raise revenue by means of a license tax. Even in the states mentioned, however, it has been quite generally held that license taxes must be uniform upon the same class of subjects.

While the decisions of the courts under constitutions containing express provisions authorizing the enactment of laws requiring license taxes can have no application to a case arising under the organic act of Alaska, where no such provision exists, it is a noteworthy fact that the framers of these constitutions deemed it necessary to insert these express provisions in order to reserve the right to collect revenue by means of license taxes. Obviously they took the position that the insertion of the provisions with reference to uniformity and assessment accord-

ing to value would destroy the right to collect license taxes unless that right was expressly reserved. No other reason can be assigned for the action taken.

A consideration of the Oklahoma organic act discloses the fact that Congress also took the view that unless the right to collect revenue by means of license taxes was expressly reserved, that right would be destroyed by the insertion in the organic act of a provision requiring uniformity and assessment according to value. Had it been the intention of Congress to permit the Alaska Legislature to raise revenue by means of license taxes it would have taken the same action that it took in the case of Oklahoma and reserved that right by a similar provision. The failure of Congress to reserve to the Alaska Legislature this right is, however, easily accounted for.

An examination of the organic act will disclose the fact that the powers conferred upon the Alaska Legislature are everywhere limited and circumscribed and the limitation upon the power to levy taxes without reserving the right to raise revenue by means of license taxes is in harmony with the general purpose of Congress to limit the power of the legislature as expressed by the organic act, taken as a whole. The sparsely settled condition of the territory, its vast extent and other peculiar conditions not met with elsewhere are the reasons that suggest themselves for thus limiting the power of the Territorial Legislature. In denying the right to raise revenue by means of license taxes, Congress

must have had in mind not only the peculiar conditions existing in the territory, but also the unusual provisions of the organic act with reference to representation in the legislature made necessary because of these peculiar conditions. Under the provision of the organic act each judicial division, regardless of its population, or wealth, is allowed four representatives in the lower house and two in the upper house of the legislature; that this arbitrary apportionment of the ^{number} ~~members~~ of representatives to which the various parts of the territory should be entitled in the legislature might lead to serious abuses in connection with the imposition of license taxes, must have been apparent to Congress.

The industries carried on in the territory are such that each is carried on in its own peculiar locality and not elsewhere, at least not to any extent, so that a license tax on any industry falls on the particular locality only in which that industry is carried on. The temptation of working for and voting for a license tax on an industry not carried on in his division is constantly held out to each member of the legislature.

The mines and the fisheries form the basis of all industrial activity in the territory. The fisheries are located along the coast in the first and third divisions and the quartz mines also are located near the seashore in these same divisions, while the placer mines are found in that portion of the third division extending back into the interior and in the second and fourth divisions. Thus a license tax imposed

upon the fisheries burdens the coast regions of the first and third division only, a license tax on the quartz mines/ operations falls exclusively upon the same localities, while a license tax upon placer mine operations effects only the second and fourth divisions and that part of the third division which extends into the interior.

Not only must Congress be presumed to have had these things in mind but also the fact that a license tax is a convenient tax to impose and that its burdens fall upon a limited number only who are not always represented in the legislature, and that imposing such taxes the legislature would only be following naturally along the lines of least resistance and greatest traction.

The members of the legislature that passed the law under consideration undoubtedly acted in the best of faith. They were undoubtedly honest men who acted honestly. Yet the injustice and inequality resulting from this character of taxation, regardless of the honesty and good faith with which it is invoked, and against which Congress undoubtedly intended to protect the people of Alaska, becomes apparent when the present law is examined.

The legislature never made any provision for the levying of any property tax whatsoever. All the money required to pay the expense of the Territorial Government is sought to be collected by means of license taxes. No substantial license tax is exacted from anyone engaged in any industry except the

mines and fisheries. Nor are all the mines taxed, the mines are not taxed unless they yield a net income in excess of five thousand dollars per annum. The low grade character of the quartz mines makes it necessary to employ large/ units in connection with their operations. Enormously large capitals are required to successfully operate these mines, and of course, if the operations prove successful, the income is correspondingly large, so that the five thousand dollar exemption makes no practical difference one way or the other. The placer mines on the other hand are operated in small units so that while there are comparatively few quartz mines in operation the number of placers in operations is almost infinite, and while the aggregate yield of the placers may exceed that of the quartz mines, the yield of any one placer is comparatively small and does not except in isolated cases produce a net income of more than five thousand dollars. And even where the net income exceeds five thousand dollars it must always be a difficult matter to collect a tax thereon in view of the fact that, ^{as} ~~it~~ is a matter of common knowledge, ~~that~~ accurate books of account are rarely kept in connection with the conduct of small individual enterprises. It follows that under this law the fisheries and the quartz mines situated along the coast in the third and first divisions are called upon to pay all but a very small per cent. of the taxes required to meet the expense of the Territorial Government. This in spite of the fact that the

fisheries are also required to pay a tax to the federal government under the act of June 1906 and the quartz mines are required to pay a tax to the federal government of three dollars per stamp under the act of Congress.

The constitutional provisions in any wise similar to the provision in the Organic Act of Alaska, found in the various state constitutions, and unaccompanied by other express provisions limiting their effect so as to have no application to license taxes or providing in express terms for the imposition of license taxes, will next be considered together with the decisions of the state courts thereunder:

The constitution of the State of California contains the following provisions:

“all property in the state not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law. The word ‘property’ as used in this article and section is hereby declared to include moneys, credits, bonds, stocks, franchises and all other matters and things, real, personal and mixed, capable of private ownership.”

“The Legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations or upon the inhabitants or property thereof for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authori-

ties thereof the power to assess and collect taxes for such purposes.”

The constitution also expressly provides that income taxes may be assessed and collected.

The provisions of the constitution of California first above quoted are not only expressly limited in their application to property taxes, but the meaning of the word “property” as therein used is expressly defined. Under the decisions of the state courts generally, which differ in that regard from the decision rendered by the Supreme Court of the United States in the case of *Welton vs. State*, 91 U. S. 278, hereinbefore referred to, license taxes are not regarded as taxes upon property. They are regarded as taxes upon occupations, and these occupations are in turn regarded as intangible things separate and distinct from the property used in pursuing such occupations. Viewing license taxes in this light, constitutional provisions which are expressly limited in their application to property taxes, such as is the provision in the California Constitution above quoted, can have no application to license taxes, since these are not regarded as taxes upon property. There is then in the California constitution no provision to which license taxes must conform. The decisions under that section of the constitution prohibiting the imposition of taxes on counties, cities, etc., however, shed light upon the meaning of the words “all taxes” as employed in the Organic Act of Alaska.

The legislature of the State of California had

passed a law requiring those engaged in certain kinds of businesses to take out a license and pay therefor fixed sums which were to be turned into the county treasury. This law was before the Supreme Court of California in the case of *People vs. Martin*, 60 Cal. 153. Its validity was assailed on the ground that the legislature had no power under the constitution to collect taxes for county purposes. It was contended that the license tax imposed was not a tax within the meaning of the constitution. It will be observed that the constitutional provision is not limited in its application to property taxes in that the taxes prohibited are those "upon the inhabitants or property thereof." This clause in the constitution, the Supreme Court of California held included not only property taxes, but also license taxes which were taxes upon the inhabitants. This act was held void. In passing upon this matter, Judge Ross, who was then a member of the Supreme Court of California, speaking for that Court, says:

"The important question in the case is, whether or not the word 'taxes' as used in this section of the constitution includes license taxes; for, if it does, the provisions of the Political Code imposing and providing for the collection of the license tax here in question, are clearly inconsistent with this section of the constitution, and therefore inoperative by virtue of Section I of Article XXII of the same instrument.

"That the license fees imposed by the pro-

visions of the Political Code were so imposed mainly, if not solely, for the purpose of revenue, does not admit of doubt; and where that is the case, they are, in effect, taxes. (Cooley on taxation, pages 396-7; 2 Dillon on Mun. Corp. Sec. 768.) Indeed, the statute itself designates the charge as a license tax. (Political Code, Sec. 3,359.)

“But are they ‘taxes’ within the meaning of Section 12 of Article XI, of the Constitution? We are of the opinion that they are. It is clear that that section is not limited to taxes upon property; for by its express language the legislature is prohibited from imposing taxes upon the inhabitants of counties, cities, towns, or other public or municipal corporations, as well as upon their property, for county, city, town, or other municipal purposes. The defendant is an inhabitant of the county of Santa Cruz, engaged in the business of selling goods, wares, and merchandise. The tax imposed upon him, and which it is proposed to collect, was undoubtedly imposed for county purposes; for as already observed, the statute authorizing it, required the tax when collected to be paid into the County Treasury for the use of the County General Fund. The power to impose such taxes for such purposes, in our opinion, no longer remains with the Legislature;”

This decision is especially applicable to the pres-

ent case in that it clearly shows the reason why some of the provisions in the various state constitutions are not applicable to license taxes. These provisions are limited to taxes on property by their express terms just as is the first provision above quoted from the California Constitution. But the provision before the Court in this case was not so limited but applied to taxes on the inhabitants and taxes on the property alike, which made it in all respects similar to the provision in the Alaska Organic Act, which is applicable by its terms to "all taxes" without regard to their character.

One of the judges then a member of the Supreme Court of California dissented from the majority ~~of~~ opinion, taking the same view that the learned trial court took in this case, that license taxes were to be distinguished from other taxes in some manner and were not to be regarded as included within constitutional provisions relating to taxes, a view that resulted from confusing license taxes exacted under the taxing power with license fees exacted under the police power.

The Supreme Court of California in rendering subsequent decisions, however adopted the views expressed by Judge Ross and concurred in by the majority of the court as law. See *Ex Parte Schuler* 139 Pac. 985. And the Supreme Court of Missouri in construing a constitutional provision containing the same language, as will be pointed out when the provisions of the constitution of that state are discussed, adopted the same construction.

The constitution of the State of Colorado provides as follows:

“All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for the taxation of all property real and personal.”

Under this constitutional provision it has been held in Colorado that a license tax can be laid and collected. It will be observed that the constitutional provision contains the following “which shall prescribe such regulations as shall secure a just valuation for the taxation of all property real and personal.” This provision of course by its terms is applicable only to property taxes.

The constitution of the State of Delaware provides as follows:

“All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws,”

The effect of this constitutional provision does not seem to have been passed upon by the Supreme Court of Delaware in so far as it affects license taxes.

The constitution of the State of Georgia provides as follows:

“All taxes shall be uniform upon the same

class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax and shall be levied and collected under general laws.”

It will be observed that under this constitutional provision all taxes, without regard to their character, are required to be uniform upon the same class of subjects. It is accordingly held by the Supreme Court of Georgia that license taxes must conform to this provision. It will be further observed that the requirement that taxes shall be ad valorem is expressly limited to property taxes. Under this constitutional provision therefor licenses taxes are excepted from the provision that taxes must be according to value. This constitutional provision therefore permits the levying of licenses taxes, though such taxes are not levied according to value, or ad valorem provided they are uniform upon the same class of subjects, and this has been the construction placed upon the provision by the Supreme Court of Georgia.

The Supreme Court of Georgia, however, went somewhat further and held that where a license tax on merchants was graduated in proportion to the volume of business transacted, the tax should be according to value, notwithstanding the fact that the constitutional provision requiring taxes to be ad valorem was limited expressly to property taxes. The Court say: “It is true that the clause cited in words applies to property, but in sense and spirit we think it covers a business tax scaled by the amount or value

of the business transacted.” *Johnson vs. Macon*, 62 Ga. 645. In this case it was further held that a license tax law graded in proportion to the amount or value of business transacted as above indicated was not sufficiently uniform upon the same class of subjects.

The constitution of the State of Indiana provides as follows:

“That the general assembly shall provide by law for a uniform and equal rate of assessment and taxation and shall provide such regulations as shall secure a just valuation for taxation of all property both real and personal.”

The provisions of this constitution it would seem are clearly limited so as to apply to property taxes only. Nevertheless the Supreme Court of Indiana in the case of *Henderson vs. London & Lancashire Ins. Company*, 135 Ind. 24, held that a tax on the business of such foreign insurance companies as are doing business in counties having cities with paid fire departments, which tax is to create a fireman's fund, violates the constitutional provision requiring equality and uniformity of taxation as it applies only to a portion of the class of foreign insurance companies, and the power of the whole state is thus exercised on a portion of the class for the benefit of a small part of the citizens of a few cities of the state. This decision indicates the tendency of the courts to apply the constitutional provisions of this character to license taxes wherever possible.

The constitution of the state of Kansas provides as follows:

“The legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least two hundred dollars for each family shall be exempted from taxation.”

This constitutional provision by its terms deals with taxation of property only and accordingly the Supreme Court of Kansas held that it did not apply to license taxes.

The constitution of the State of Maine contains the following provision:

“All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just valuation thereof.”

This provision like that contained in the Indiana Constitution is by its terms limited in its application to taxes on real and personal estate and does not therefor apply to licenses taxes.

The constitution of the State of Minnesota provides as follows:

“All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform

throughout the state Laws shall be passed taxing all moneys, credits, investments, in bonds, stocks, joint-stock companies or otherwise, and also all real and personal property, according to its true value in money.”

It will be noted that the provision in this constitution requiring equality applies to all taxes alike, but that the remaining provisions requiring levies to be made according to cash valuation, and taxes to be assessed according to value are expressly limited in their application by the terms of the provision to property taxes. It was accordingly held by the Supreme Court of Minnesota that all license taxes must be uniform, and further that all taxes upon property must be assessed according to value. *Willis v. Standard Oil Co.*, 52 N. W. 652-4; *In Re Tax Delinquency in St. Louis County*, 75 N. W. 970; *Minces v. Schoenig*, 75 N. W. 711;

In the case of *Willis v. Standard Oil Company*, the Supreme Court of Minnesota was called upon to pass on the validity of a law providing for the payment of a fee to inspectors of oils. All oils shipped in and used for illuminating purposes were required to be inspected and the inspector was, for such inspection, entitled to certain fees. The objection was made that the fees exacted were exacted for the purpose of revenue and that the measure was in fact a measure designed to raise revenue. The Court held if that were the object of the measure, it could not be sustained under the constitutional provision. The

court says: "It is also objected that the act is one levying a tax, and not a police regulation. Of course, under the constitutional provision requiring taxes to be as nearly equal as may be, and to be levied on a cash valuation, the law could not be sustained as a tax law. It can only be upheld as an exercise of the police power of the state;"

In the case of *Re Tax Delinquency in St. Louis County*, the Supreme Court of Minnesota passed upon a law providing that mining companies might pay in the state treasury annually, in lieu of all taxes or assessments upon capital stock, personal and real estate, of such companies in or upon which real estate such business of mining might be carried on, or which was connected therewith, and set apart for such business the following amounts, to-wit: For each ton of copper, fifty cents, and for each ton of iron ore mined, shipped or disposed of, one cent. The court held that under the Minnesota Constitution the act was void, and in passing upon the matter they say: "It would be difficult to conceive of a system of taxation more obnoxious to the Constitution."

In the case of *Minces v. Schoenig*, the court had before it an ordinance passed by the City of Winona which contained the provision that those who conducted bankrupt sales were to obtain a license and in addition to the payment of ^a~~such~~ fee, justified under the police power, were required to pay a tax of two per cent. of the amount of the gross receipts.

In holding this ordinance void, the court says: "This mode of taxing is so palpably in conflict with Section 1, Article 9 of the Constitution which requires that all property on which taxes are to be levied shall have a cash valuation, that it cannot stand for a moment. The legislature itself has not power to adopt any such system of taxation, or to grant authority to a municipality to do so."

The constitution of the State of Michigan contains the following provisions:

"The legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law All assessments hereafter authorized shall be on property at its cash value.

"The legislature shall provide for an equalization of a state board in the year 1851, and every fifth year thereafter, of assessments on all taxable property except that paying specific taxes."

The Supreme Court of Michigan held that the terms "specific tax" used in the constitution provision embraced license taxes, a license tax being of course a specific tax on business.

Under the constitution of the State of Massachusetts the legislature is empowered

"to impose and levy proportional and reas-

onable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities, whatsoever, brought into, produced, manufactured, or being within the same.”

The effect of this constitutional provision was before the Supreme Court of Massachusetts in the case of *Portland Bank v. Apthorp*, 12 Mass. 252-256. The legislature had enacted a law taxing banks one-half of one per cent. on the amount of their capital stock. In discussing the validity of this law in the light of the constitutional provision, the Supreme Court of Massachusetts hold that the tax could not be justified under the first part of the provision and in that connection the court say: “Under the first branch of this power, namely, that of imposing and levying rates and taxes, the requisition upon the banks cannot be justified; for those taxes must be proportional upon all the inhabitants of, and persons resident and estates lying within, the Commonwealth. The exercise of this power requires an estimate or valuation of all the property in the Commonwealth; and then an assessment upon each individual, according to his proportion of that property. To select any individual or company, or any specific article of property, and assess them by themselves, would be a violation of this provision of the constitution.”

It will be observed from the language quoted that the assessment of a license tax would be considered as prohibited under the constitutional provision if the first portion of the provision alone were considered, yet this portion of the constitution of Massachusetts does not ^{at}~~at~~ clearly and definitely apply to all taxes alike as does the provision in the Alaska organic law.

The tax in question was, however, upheld by the Supreme Court of Massachusetts on the ground that the subsequent portion of the provision in the Massachusetts constitution allowed the collection of excises on commodities. The term "commodity" was given a broad meaning, so broad indeed as to include everything on which a tax could be laid. The court justified its action in so construing the word "commodity" on the ground that the legislature had always so construed it since the adoption of the constitution itself thirty years ago. This was considered by the court as being sufficient evidence to show that the framers of the constitution must have intended to give this meaning to the word "commodity."

The constitution of the State of Mississippi provides as follows:

"Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

It will be noted that the provision requiring uniformity and equality applies to taxes generally, while the remaining provisions are limited by their terms to property taxes.

The constitution of the State of New Hampshire gives the General Court power

“to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and residents within, the said state, and upon all estates within the same.”

Under this provision of course a license tax can be imposed as, “it is a tax,” as the Supreme Court of California held in the case of *People v. Martin*, “upon the inhabitants.” Nevertheless the Supreme Court of New Hampshire held that these taxes must be uniform. *State v. Pennoyer*, 65 N. H. 113; 18 Atl. 878. In this case the Supreme Court of New Hampshire had before it a law requiring physicians to procure a license and pay a stipulated amount therefor. The law did not apply alike to all physicians and was accordingly held void as lacking in uniformity.

The constitution of the State of Missouri contains the following provisions:

“Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and all taxes shall be levied and collected by general laws.

“All property subject to taxation shall be taxed in proportion to its value.

“The General Assembly shall not impose taxes upon counties, cities, towns, or other municipal corporations or upon the inhabitants thereof or property thereof, for county, city, town or other municipal purposes, but may by general laws vest in the corporate authorities the power to collect and assess taxes for such purposes.”

It will be noted that this constitution, like practically all the other constitutions, and unlike the Alaska organic act, contains two separate provisions, one applying to taxes generally and the other to property taxes only. It is similar to the Alaska organic act in that all taxes are required to be uniform upon the same class of subjects. It differs from the Alaska organic act in that under it all property subject to taxation shall be taxed in proportion to its value, while under the Alaska provision “all” taxes must be assessed according to the value of the thing which is the subject of taxation. This constitutional provision is construed by the courts so as to carry out the meaning so clearly expressed and license taxes are included within the provision, where taxes generally are referred to and are required to be uniform upon the same class of subjects.

In the case of *City of St. Louis v. Spiegel*, 2 S. W. 839, it was held that license taxes must under the Missouri constitution be uniform upon the

same class of subjects. An ordinance had been passed by the City of St. Louis providing for a license tax of \$25 on meat shops situate in one part of the city and \$50 on meat shops situate in another part of the city. It was held that this license tax violated the constitutional provision requiring uniformity.

The constitutional provision providing that the legislature shall not tax counties, cities, etc., or the inhabitants or property thereof, for county, city, town or other municipal purposes, is in all respects like the provision that subject contained in the California constitution, and the Supreme Court of Missouri placed thereon the same construction previously placed on a similar provision by the Supreme Court of California. *State Ex Rel Wyatt vs. Ashbrook* 72 Am. St. Rep. 765.

It was claimed in this case that an act of the Missouri legislature requiring a license tax from department stores was void for two reasons. First that the legislature had no power to pass the law since two-thirds of the revenue derived under it was paid into the city treasury, the law being therefor designed to raise revenue for municipal purposes and being imposed upon the inhabitants of the cities. And for the further reason that it lacked uniformity in that it applied only to department stores. The Supreme Court of Missouri held that the act violated the constitution in both respects. This decision, like the decision by the Supreme Court of California, is

important in that it is held that the term "tax" when used in the constitution includes license taxes unless it is expressly restricted to property taxes. As in California the tax therein prohibited was any tax on the inhabitants or property. In Alaska the term used is "all taxes" which is equally comprehensive.

The constitution of the State of Nevada provides as follows:

"The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessory."

This provision by its terms requires no more than a just valuation for taxation of all property, real personal and possessory, and has of course no application to license taxes.

The constitution of the State of New Jersey provides as follows:

"Property shall be assessed for taxation under general laws and by uniform rules according to its true value."

This provision also is limited in its application to the taxation of property.

The constitution of North Dakota provides as follows:

"laws shall be passed taxing by uniform rule all property according to its true value in money."

The terms of this provision also expressly apply to the taxation of property only.

The constitution of the State of Ohio provides as follows:

“Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all real and personal property, according to its true value in money;”

It will be observed that the provisions in the Ohio constitution are such that they apparently relate to property taxes only yet the Ohio courts have persistently justified non-uniformity in connection with money exactions for licenses on the ground that they were exacted under the police power, indicating thereby that exactions under the taxing power would be required to be uniform.

The Ohio decisions are reviewed in the opinion in the case of *Pittsburg, C. & St. L. R. R. Co. v. State*, 30 N. E. 435. An act passed by the Ohio Legislature required every corporation or company operating a railroad or any part of a railroad within the state to pay to the Commissioner of Railroads and Telegraphs a fee of \$1.00 per mile for each mile of track operated by it within the state. The constitutionality of this act was assailed on the ground that it levied a specific tax on property. It was contended that the money sought to be collected was a fee and not a tax and did not come within the constitutional inhibition. In support of this contention, it was urged that the Supreme Court of Ohio in a pre-

vious decision had held that a license fee exacted from gas companies did not come within the constitutional inhibition requiring uniformity. The Supreme Court of Ohio reviewed this early decision indicating that the gas business was a business that required police supervision; that the law imposing the exaction upon the gas companies provided for numerous kinds of regulation and that the license fee required from the gas companies was required in order to pay the cost of this regulation under the police power. It was further shown that the decision of the court in that case was based upon that ground and the law sustained as an exercise of the police power. The court then proceeded to apply this theory of the law to the facts in the case. It was pointed out that the law under consideration did not provide for any regulation and that the exaction of \$1.00 per mile was a tax pure and simple and that its nature as a tax was not affected by the fact that it was called a fee. The court say: "A tax is a pecuniary burden imposed for the support of the government Burdens or charges imposed by the legislative power of a state upon persons or property to raise money for public purposes. The money raised by this section under consideration is directed to be paid into the state treasury; it becomes a part of the funds of the state applicable to any conceivable public purpose. There is not a word in the section under consideration, or in the act to which it is supplementary, to indicate a purpose that the

fund raised shall be limited, or even in any way specially applied, to the expenses incurred in supervising the railroads of the state. A law like this—the direct and only purpose it can accomplish, being to create a fund by an exaction on property to be paid into the state treasury to be used indiscriminately for any and all public purposes—must be regarded as creating a tax. It bears no resemblance to, and should not be confounded with, that class of laws enacted by the legislature, the immediate object of which is to call into active operation the police powers of the state, but which, incidentally or indirectly, may cause the production of public revenue.”

The constitution of the State of Oregon provides as follows:

“No tax duty shall be imposed without the consent of the people or their representatives in the Legislative Assembly; and all taxes shall be equal and uniform.

“The Legislative Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal
”

It will be observed that the only provision in the Oregon constitution that applies to all taxes is the provision requiring equality and uniformity. The other provisions are expressly limited in their application to taxation of property, real and personal. All

that would be required of a license tax under this provision is equality and uniformity. Taxes on property, however, both real and personal are required to be in accordance with a just valuation.

In deciding the case of *Ellis v. Frazier*, 63 Pac. 642, the Supreme Court of Oregon was called upon to pass on the validity of a tax under the Oregon constitution. A law had been passed by the Oregon legislature requiring the owners of bicycles to pay a tax of \$1.25, whereupon they were furnished with a tag indicating that the tax had been paid, which was to be attached to the bicycle for and on account of which it had been collected. It was contended that this was an exaction that did not come within the constitutional inhibition. But the court held it was a tax and that for that reason it was void as lacking uniformity since bicycle owners in certain counties only were required to pay it. And furthermore that it was a property tax and for that reason violated the constitutional inhibition that property taxes must be *ad valorem* or assessed according to value. In passing upon this question the Supreme Court of Oregon say: "As a preliminary matter, it is important to consider whether the burden thus imposed upon bicycle owners is a tax or a license; for, if the latter, it is not inhibited by the provisions of the organic act relied upon, the courts generally holding that the constitutional requirement as to uniformity of taxation has no reference to the taxation of occupations." (It must be noted that the

Supreme Court of Oregon used the term "license" and the term "occupation tax" interchangeably as referring to exactions under the police power and not to exactions under the taxing power; that what is usually spoken of as a license tax is not included within the meaning of either of the terms as used by the Oregon Supreme Court. This is evident from the context.) Continuing the court say: "The legislative assembly has referred to the levy as a tax, but the descriptive designation is unimportant; for the object sought to be attained by the enactment must determine the character of the exaction. 'The distinction between a demand of money, under the police power, and one made under the power to tax,' says Judge Cooley, 'is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation, and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case, and referring it to the proper power.' Cooley, Tax'n. 396. It was held, in the case of *In re Wan Yin* (D. C.) 22 Fed. 701, that whenever it is manifest that the fee for a license to conduct an occupation is substantially in excess of the sum necessary to cover the cost of issuing the license and the incidental expense attending the regulation of the business, the burden is a tax, and not a license." The court then proceeded to review other similar cases and continuing say. "Whatever the

rule may be in respect to the granting of licenses which incidentally result in producing a revenue, or the law in relation to the authority of a municipal corporation in the maintenance of its streets, it cannot reasonably be inferred that the burden imposed by the act in question was an exercise of the police power of the state; for the use of a bicycle does not necessarily tend to the destruction of the highways. We do not wish to be understood as intimating that the sum of one dollar more than the cost of executing the necessary receipts and supplying the requisite tags is an unreasonable exaction, but, inasmuch as that sum is set apart from each collection as a fund for the purpose of constructing and maintaining bicycle paths, it is evident, we think, from a consideration of the entire act, that it was primarily designed as a means of raising revenue, and the burden thus imposed must therefore be treated as a tax, and not a license." It was then held that since bicycles differ greatly in value, the tax violated the provision requiring uniformity and equality. The court say: "The value of all bicycles not being the same, the tax of \$1.25 upon each destroys the required uniformity in the assessment, and renders the rate of taxation unequal, so that the tax in this respect violates the constitutional provision above quoted." As has been elsewhere shown in this brief the act was also held to violate the constitutional provision that property must be taxed according to value, the court holding that this tax was in fact a tax on the property itself.

Later on the Supreme Court of Oregon had occasion to pass upon the act of the legislature more or less similar in character, *Reser v. Umatilla County*, 86 Pac. 595. In this case the court had before it an act which required the nonresident owners of sheep bringing sheep into the state for pasturage or for the purpose of driving such sheep through the state, to pay a tax of a fixed sum per head. It was urged by the Attorney General that the exaction was made under the police power of the state and was not therefor subject to the limitations imposed by the constitution with reference to the collection of taxes. But the court held the exaction to be a tax and held the tax void as lacking in uniformity and as having been levied without regard to valuation. In the course of the opinion it say: "It is sometimes difficult to distinguish between a tax and a license. Generally speaking, a tax is a charge or burden imposed on persons or property for the support of the government or for some specific purpose authorized by it. Its object is to raise revenue. A license, however, is a permission to do what would otherwise be unlawful. The fee or charge often exacted therefor is in law supposed to cover the cost of issuing the license and the expense incident to regulating and controlling the business, although it may ultimately result in a source of revenue. To relieve a law, imposing a burden or tax upon persons or property, from the operation of the constitutional provision relative to taxation, it must have for its primary ob-

ject the granting of some privilege or the imposing of some restraint.”

It will be noted that in each of these cases the law before the court levied a specific tax on property. Such taxes in common with all other taxes were required by the constitution to be equal and uniform, since the clause requiring equality and uniformity applied to all taxes alike and being property taxes they were required to be assessed according to value, since by the provisions of the constitution property taxes are required to be so assessed. However, since the constitutional provision requiring assessment according to value is expressly limited in its application to property taxes, there would seem to be no good reason why a license tax could not be collected in Oregon if such tax were equal and uniform unless the view were adopted expressed by the Supreme Court of the United States in the case of *Welton v. State* that these taxes on business were in effect a tax on the property employed in connection with such business. The Supreme Court of Oregon seems to have taken this view of the matter, for while the taxes before the court were not license taxes, but specific property taxes, the opinion in each case contains a discussion of the validity of specific taxes generally including license taxes and leads to the conclusion that under the Oregon constitution no money can be exacted except in the form of ad valorem property taxes unless the exaction be made in the exercise of the police power of the state.

The constitution of the State of Pennsylvania provides:

“All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax and shall be levied and collected under general laws.”

This constitution contains no provision requiring assessment according to value, the only provision contained being one requiring uniformity upon the same class of subjects and this, like the provision in the Alaska Organic Act, applies to all taxes alike. Accordingly it is held by the Supreme Court of Pennsylvania that occupation or license taxes come within its requirements and must be uniform. Banger's Appeal 109 Pa., St. 79.

In this case the court had before it an ordinance of the city of Williamsport under which it was sought to collect an occupation tax, the amount of which was in each case determined by the income of the person taxed. The ordinance was held to be invalid on two grounds: First, that the tax was in fact the income tax and that while the city of Williamsport had authority to levy occupation taxes, it had no authority to levy income taxes. Second, that the constitution of the state required all taxes to be uniform upon the same class of subjects; that the tax in question, regardless of its character, was not uniform upon the same class of subjects and was therefore void as failing to comply with this constitutional requirement. The court, discussed at

some length the manner in which occupation taxes could be levied so as to comply with the constitutional requirement of uniformity and the reason why the tax before the court did not answer this requirement. In referring to the opinion expressed by the lower court to the effect that the tax complied with the requirement of uniformity, the Supreme Court say: "These views of the learned court are well enough as far as they go, but they do not come to the proper standard of uniformity. However, they might have been regarded prior to the adoption of the present constitution. They do not conform to the requirements of the organic law as it exists at the present time. That requires not merely that there shall be no exemption of persons or classes, but that upon persons and classes the tax shall be uniform."

The constitution of the State of South Dakota provides as follows:

"All taxation shall be equal and uniform. All taxes to be raised in this state shall be uniform on all real and personal property, according to its value in money."

It will be observed that the constitution contains a uniformity clause that applies to all taxes alike, while the clause requiring taxation according to value is limited by its terms to taxes on real and personal property. It was accordingly held by the Supreme Court of South Dakota that since the clause requiring equality and uniformity applied to all taxation, license taxes must be equal and uniform. In

Re Watson 97 N. W. 465. In this case the court had before it a law requiring a license tax from peddlers, exempting peddlers of nursery stock and other classes of peddlers from its operation. It was contended that this tax lacked uniformity and was therefor obnoxious to the constitutional provisions requiring uniformity in the case of all taxation. On the other hand it was argued that in some jurisdictions the uniformity clauses were not applied to license taxes. The Supreme Court of South Dakota however held that such contention could not be maintained under the provision of the constitution of that state, which did not expressly limit the requirement of uniformity to property taxes, but provided that all taxes must be uniform. In reference to this matter the court say:

“Such position cannot be taken in this state. The clause ‘and all taxation shall be equal and uniform’, found in the Bill of Rights, cannot be ignored. Constitutions are supposed to be prepared with much care and deliberation. It will not do to assume that such important instruments contain any idle or meaningless phrases. On the contrary, it must be presumed that every word was advisedly selected, inserted for a purpose, and intended to have its due weight in determining what organic principles have been established. In this state, then, taxes on occupations must be equal and uniform.”

The constitution of the State of Washington provides as follows:

“all property in this state, not exempted under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property.”

It will be observed that each and every provision contained in this constitution relative to taxation is expressly limited by its language to property taxes and can therefore have no possible application to license taxes under the view taken by the state courts that those taxes are not taxes on property.

The constitution of the state of Wyoming provides as follows:

“No tax shall be imposed without the consent of the people or their authorized representative. All taxation shall be equal and uniform. All property, except as in this constitution otherwise provided, shall be uniformly assessed for taxation and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal.”

It will be observed that the constitutional re-

quirement of equality and uniformity in Wyoming, as in South Dakota, applies to all taxation, while the provision requiring taxes to be assessed according to value is expressly limited to property taxes. There is therefore nothing in the constitution to prevent the exaction of license taxes provided they are equal and uniform.

In the case of *State vs. Willingham*, 9 Wyo. 290; 62 Pac. 797, a city ordinance was attacked on the ground that the license tax required was not uniform and was therefore in conflict with the constitution. The court reviewed the provisions of the ordinance and held that the tax imposed was in fact a uniform tax and satisfied the constitutional provision.

The constitution of the state of Wisconsin provides as follows:

“The rule of taxation shall be uniform and taxes shall be levied upon all property as the legislature shall prescribe.”

This constitutional provision is rather indefinite. Its effect was considered by the Supreme Court of Wisconsin in the following cases: *Fire Department of Milwaukee v. Holvanstein*, 16 Wis. 136; *Morrill v. State*, 38 Wis. 428; *State v. Whitcom*, 122 Wis. 110; 99 N. W. 468.

In the case of *Fire Department of Milwaukee v. Halvanstein*, the court passed upon the validity of a law requiring foreign insurance companies to pay a per cent. of their premiums for the benefit of the

fire departments of some of the cities. It was contended that this was a tax and void since it lacked uniformity. But the Court held that the exaction was not a tax but a fee exacted by the state in the exercise of its police power and that the law was no more than a police regulation. The court say: "Nor is the requirement an exercise of the power of taxation as to the companies, but only a proper exercise of the police power inherent in the sovereignty of the state."

The decision in the case of *Morill v. State* relating to the validity of an act of the state legislature requiring hawkers and peddlers to take out a license and pay a fee therefor. It was claimed that this was an exercise of the taxing power and that for that reason the fee must be uniform. The court however held that the legislature had the authority under the police power to prohibit hawking altogether, and had the undoubted power to regulate its exercise, because hawking and peddling were regarded as unsavory lines of business. It was accordingly held that the act in question was enacted under the police power for the purpose of regulation and was not governed by the constitutional inhibitions relating to taxation. After quoting from Jacob's Law Dictionary, where hawkers are defined as deceitful fellows etc., and making the statement that it was not the intention to cast any reflection upon the parties before the court, in view of the fact that many honest men were in the business of peddling,

the court say: "but with this disclaimer we must be permitted to add that undoubtedly resort is often had to this business for the sole purpose of obtaining admittance, which could not otherwise be obtained into private dwelling houses in furtherance of some criminal or unlawful object. This is another reason where the restriction or regulation of the business is an exercise of police power." This case was afterwards appealed to the Supreme Court of the United States as reported in the 154 U. S. 626. The judgment of the Supreme Court of Wisconsin was reversed. The Supreme Court of the United States do not discuss the case in the opinion any further than to say it was reversed on the authority of *Welton v. State*.

The decision in the case of *State v. Whitcom* deals with the validity of an act passed by the Wisconsin legislature requiring peddlers to procure a license and pay a fee therefor. Veterans of the Civil War and a number of others were exempted from the operation of the act. The court referred to two former cases decided by it, which leave the question as to whether a license tax could be exacted under the provisions of the Wisconsin Constitution in doubt and in view of the fact that that matter had not been argued in this case and the further fact that an expression on it was not necessary to the decision, the court refused to pass on it.

It was held that it was immaterial whether the license fee required under this law were viewed as

a tax or an exaction under the police power, as in either event the law would be void. If viewed as a tax it could not be sustained unless it was uniform upon the same class of subjects. If viewed as an exaction under the police power, it could not be sustained since it denied the equal protection of the laws, even though its object was to protect the public against irresponsible and deceitful traders. In the course of the opinion the courts say: "In considering the exemptions or partially disabled veterans of the civil war a quite unanswerable question arises, why, whether for purpose of taxation of police, they should be exempted any more than equally disabled veterans of other wars." And further on in the opinion it is said: "It seems neither necessary nor wise to carry further a critical analysis of this statute. We have pointed out several respects in which it fails to impose its penalties upon persons not distinguishable from the appellant by any legitimate classification. It therefore denies him the equal protection to which, both by Federal and State constitutions he is entitled, and cannot be valid as against him whether its purpose be taxation or regulation of conduct."

None of the other state constitutions contains a provision at all similar to the provision contained in the organic law of Alaska. A review of the various constitutional provisions limiting the power of taxation and the decisions thereunder discloses the fact that the courts have construed these provisions

just as they were written. In many of the state constitutions the provision relating to uniformity is not by its terms limited to property taxes, but like the Alaska provision is so worded as to apply to all taxation alike, and wherever such is the case it will be observed that the courts have generally, if not universally, held that the provision related to all taxation regardless of the character of the tax and that license taxes in order to be valid must be uniform in compliance with the constitutional provision.

It will be noted that no state constitution contains a provision similar to that found in the Alaska Organic Law providing that "all taxes" must be assessed according to value. The provisions in all the state constitutions requiring assessment according to value are expressly by their terms limited to taxes on property, and being so limited, the provisions can not and do not become material in discussing the validity of a license tax. But in the case of these provisions the courts also have given them effect according to, and construed them in accordance with, the exact language employed. While the language employed differs more or less in each case all these provisions provide substantially that property taxes shall be levied according to the value of the property taxed. And wherever a provision of this character exists the courts have held that the power of the legislature in connection with the assessment of property taxes is limited to taxes assessed according to value. That is to say, all specific property

taxes are done away with and such taxes are in all cases required to be ad valorem.

Since the decisions of the various state courts under these varying constitutional provisions do no more nor less than construe these provisions in accordance with the exact language employed, they do not and can not furnish any authority under which a construction can be placed upon the provisions of the Alaska Organic Act, which is not in accordance with its exact language. The Organic Law of Alaska provides that "all taxes" shall be uniform upon the same class of subjects. In this respect it is similar to the organic law of many of the states. The provision applies to all taxes. No distinction is made between license taxes and property taxes. It refers to "all taxes," that is to say, each and every kind of a tax and since a license tax is a tax, it must, in order to be valid, conform to the requirement of uniformity, and this is in accord with the decisions of the state courts rendered under similar constitutional provisions. But the provision in the Alaska Organic Act does not stop here, it requires more than uniformity. The language is, "all taxes shall be uniform upon the same class of subjects and the assessments shall be according to the actual value thereof. Under this provision then all taxes must be based upon an assessment and this assessment must be according to the actual value of the thing which is the subject of taxation. No state constitution contains the provision that all taxes must be

assessed according to the actual value of the thing taxed. This provision is peculiar to the Alaska Organic Law. Many state constitutions provide that all property taxes shall be levied according to actual value, but none, that *all* taxes shall be so levied, or that any tax, other than property taxes, shall be so levied, ~~or that any tax, other than property taxes, shall be so levied.~~ Apply the rule of decision applied by the state courts under the provision that all taxes must be uniform to the provision in the Alaska Organic Law. It follows that all taxes which are not assessed according to the actual value of the thing taxed are void, for as was pointed out in discussing uniformity clauses, license taxes are taxes, and being taxes are embraced within the term "all taxes" which is at once the most comprehensive and the most all inclusive of any term that Congress could have employed. If this language does not include license taxes, it is difficult to conceive of any language that would have been broad enough to include them. The statement contained in the Alaska Organic Act is equivalent to the statement that no tax shall be collected which is not uniform upon the same class of subjects, and which has not been assessed according to the actual value of the thing taxed, and since no tax, except an ad valorem property tax, can conform to these provisions that is the only tax that can be levied and collected under the Alaska Organic Law. It may here be added that the ad valorem system of taxation is the only safe, reasonable

and just system. Under it property is taxed and not the use of it. Unlike the license tax system, it does not place a premium upon idleness at the expense of industry and where it is levied with uniformity it distributes the burden of taxation equally and fairly.

It is urged that the provision requiring assessment according to value can not have been intended to apply to license taxes because these taxes can not be assessed according to value. It is true that license taxes cannot be assessed according to value, but it does not follow that for this reason they can be levied under a provision in the Organic Law requiring "all taxes" to be assessed according to value. It simply follows that license taxes can not be imposed. To contend otherwise leads to the most ridiculous conclusions for if license taxes can be assessed under this provision for the reason that its terms are such that a license tax can not conform to it, then it must follow that any tax can be assessed which is of such character that it can not conform to the requirements of the provision and can not be brought within its terms.

A specific property tax which differs from a license tax only in that it is a specific tax on property whereas the latter is a specific tax on occupations, can not be made to conform to the requirements of this provision, for while it is a tax on property it is a tax of so much per article without reference to the value of the article, just as an occupation tax is a tax of so much on a given occupation without ref-

erence to the value of the occupation. It is this that makes it a specific tax. If a specific tax were made to conform to the constitutional requirement so as to be assessed according to value, it would cease to be a specific tax and become an ad valorem tax. No specific property tax therefor can conform to this requirement. Hence, if the provision is to be so construed as not to apply to taxes that can not be made to conform to it, specific property taxes are not within its terms and can be levied notwithstanding a provision that "all taxes" must be according to value.

What is said of specific property taxes is true of each and every kind of a tax, except an ad valorem property tax, for no tax except an ad valorem tax is assessed according to value. If therefore all kinds of taxes that can not be made to conform to this provision are to be considered as not coming within it and are to be allowed notwithstanding the fact that they are ^{not} assessed according to value, then any kind of a tax whatsoever, be its character what it may, may be levied notwithstanding the fact that it is not assessed according to value. That is to say, since no tax, except an ad valorem property tax, can be levied according to value, specific property taxes, license taxes and every other conceivable kind of a tax may be levied notwithstanding the constitutional provision that all taxes must be levied according to value, if it be conceded that the requirement of assessment according to value was not intended to apply

to taxes that are of such a character that they can not be made to conform to it. The adoption of this view therefore would entirely destroy the effect of the provision. It would be equivalent to saying that a provision that taxes must be assessed according to value applies only to ad valorem property taxes for these are the only taxes that can be made to conform to this provision. All taxes, if this contention is regarded as sound except ad valorem property taxes can of course be levied because these can not conform to the provision and ad valorem property taxes can of course be levied because these can not exist without conforming to the provision, so the provision becomes entirely meaningless and is left without any effect whatsoever.

The idea that the term "all taxes" does not include license taxes finds its origin in a wrong conception of what a license tax really is. It results from a confusion of license fees exacted under the police power with license taxes. There is nothing occult or mysterious about a license tax. It is not different from any other kind of a tax, it is simply a specific tax upon occupation, just as a specific tax on property is a specific tax on property. Money exactions under the police power may be allusive and peculiar in character because of the elasticity of the police power, but these characteristics do not apply to license taxes.

Viewed therefor from the standpoint either of reason or authority, the term "all taxes" must be

held to include license taxes and since the tax sought to be collected in this action is not uniform upon the same class of subjects in that it discriminates against those canneries that are so situate, because of natural conditions, that they are obliged to use fish traps in order to secure their fish supply, in favor of such canneries as are so situate because of natural conditions that they can use seines for that purpose, and is not assessed according to value, since the question of value is not taken into consideration at all. All fish traps regardless of their value being assessed \$100 each. In this connection attention is called to the fact that it is stipulated in the case that some of the fish traps on which this tax is sought to be collected are worth as much as \$10,000.00, while others are not worth to exceed \$1,000.00.

But the learned trial judge expressed the opinion that express authority had been conferred upon the legislature to exact a license tax. If such express authority exists it must exist because of the following provision in the organic act:

“That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or

to the act entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes,' approved January twenty-seven, nineteen hundred and five, and the several acts amendatory thereof: Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

In the first place it will be observed that this provision does not contain a grant of power. The provision taken as a whole is a limitation upon the power of the legislature. Congress had enacted a law with a view of collecting revenue to meet the expense of the general government in administering the law in the Territory. It was deemed desirable to keep this law in force accordingly a provision was inserted against its repeal by the Territorial legislature. But in order that this provision might not be given a broader construction than was intended for it, it was provided:

"That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

The clause does not in any sense contain a grant of powers but is a mere statement inserted to prevent a provision containing a limitation upon the powers of the legislature from receiving too broad a construction.

Viewed, however, as an express grant of powers this clause does not confer the power to impose a license tax. A grant of power to require license authorizes the exaction of licenses under the police power for the purpose of regulation, but does not authorize the exaction of license taxes under the taxing power. The right to require the latter exists if it exists at all under the taxing power and must be exercised in subordination to the limitations placed upon that power by the organic law, the former exists under the police power and is controlled by the limitations placed upon that power by the organic law, without any reference whatsoever to the limitation relating to the exercise of the taxing power. The right to require a license and the right to impose a license tax are separate and distinct rights, bearing no relation to one another; and a grant of the former does not include the latter. Upon this the authorities are agreed.

Sunset Telephone and Telegraph Co. v.

City of Medford 115 Fed. 202.

In re Laundry Licenses 22 Fed. 701.

Clark vs. Brunswick, 43 N. J. Law 175

Cache County v. Jensen 61 Pac. 303.

State v. Smith 35 Atl. 506 (Conn.)

52 Am. St. Rep. 301.

The case of the Sunset Telephone and Telegraph Company v. City of Medford arose before Judge Bellinger. The charter of the City of Medford, Oregon provided as follows:

“The city council shall have power to license, regulate or prohibit telegraph and telephone companies using the roads, streets, or alleys of the city and road district, and to fix the compensation which such companies shall annually pay to the city for such license or privilege. But no license shall grant an exclusive right to any such company.”

Under this provision in the charter the city passed an ordinance requiring telephone companies to pay one hundred (\$100.00) dollars per annum as a license fee. The court held that the fee was so large that it was obviously a revenue provision and that it was therefore not within the authority conferred on the city by its charter. In passing upon the ordinance the court say:

“The ordinance complained of provides that no person shall engage in the telephone business, or place in or occupy any of the streets with its poles and wires, without paying, for an annual license so to do, the sum of \$100, and, when this sum is paid, the city recorder shall issue a license to the person, authorizing and permitting said person or company to engage in the telephone business within said city for the period of one year; that the person or company paying said license fee, during the year for which they have paid such license, shall have a right to occupy the streets and alleys with his

or its poles and wires, etc. This is a revenue provision, and is not within the authority conferred upon the city by its charter. 'The power to license, as a means of regulating a business implies the power to charge a fee therefor sufficient to defray the expense of issuing the license, and to compensate the city for any expense incurred in maintaining such regulation. Whenever it is manifest that the fee for the license is substantially in excess of what it should be, it will be considered a tax, and the ordinance imposing it void.' *Laundry License Case* (D. C.) 22 Fed. 701. If the city has authority, under section 102 of the charter, to fix the compensation which shall be annually paid for such license or privilege to use the roads and streets of the city, then the city might have required the payment of the sum fixed by the ordinance for such use. But it did not do this. From the averments of the bill, it appears that the complainant has the right to use the streets of the city, by permission of its lawfully appointed officers. If so, the city cannot add new conditions to the grant after the company has accepted it and established its plant. If by the power to fix compensation is meant the compensation that the city is to receive for the license regulation, the case is within the rule of the *Laundry License Case* (D. C.) 22 Fed. 701, and the compensation to be fixed must not go beyond

the expense of issuing the license and maintaining the license regulation. In short, the city cannot add to the conditions upon which the right to use the streets was granted to the complainant, and while it may exact compensation for the license, it cannot, under the power given in its charter, make such compensation a matter of revenue."

The case of *In Re Laundry License* arose in Oregon. A city ordinance of the City of Portland required the proprietors of wash houses to pay a quarterly fee of five dollars, making an annual fee of twenty dollars. The charter of the city of Portland authorized the city to regulate wash houses, laundries, and the like, and another subdivision in the charter authorized the city to license and regulate all such callings, trades and employments not prohibited by law, "as the public good may require." The question before the court was whether these provisions in the charter authorized the license fee of twenty dollars per annum exacted from the proprietors of wash houses. The matter arose on a petition for a writ of habeas corpus. The petitioner had been convicted for violation of the Portland ordinance and, the case arose before Judge Deady. Judge Deady held that the city had under the provision quoted the power to license laundries, but that a license could be exacted only in connection with the exercise of the power to regulate, and that it could not be used as a pretense for raising revenue. The Court held that one dollar per year would be ample to re-imburse

the city for registering a license and that the fee of twenty dollars must be regarded as a revenue measure and therefore void.

The case of *Clark v. New Brunswick* arose in the State of New Jersey. The city charter of the city of New Brunswick empowered the city council to pass ordinances to license and regulate cartmen, hawkers, peddlers, auctioneers, pawnbrokers, junk and shop keepers and others. Under this grant of powers the city council of New Brunswick passed a license law very similar to the act passed by the Territorial Legislature. The act was held void on the ground that the power to exact a license tax was not conferred upon the city. In passing upon this matter, the court, speaking through Judge Van Sychel say:

“Under such grant of power it has been repeatedly held in this state, the right of taxation for revenue purposes is not conferred. It is purely a police power and must be exercised for the purpose of regulation. The city may be incidently benefited by the imposition of fines and penalties, but they must be reasonable and appropriate to the regulation of the various pursuits enumerated. Any attempt to establish a fiscal scheme under the grant is without authority by law.” Again the court quoting with approval from a former decision rendered by the Supreme Court of New Jersey say: “When authority is given to require the pos-

session of a license as a condition for selling, a reasonable fee, to cover probable expense can be demanded, but the exaction of sums in excess of such expenses and graduated by the amount of business done can be nothing else than a tax upon such business."

The case of Cache County v. Jensen arose in the State of Utah. The laws of the state authorized counties to require licenses for the purpose of regulation and revenue. Cache County imposed a license on those ^{engaged} ~~grounds~~ in herding sheep. The amount of the license fee exacted depended upon the number of sheep and was so large that it was evidently intended as a means of raising revenue. The ordinance requiring the license did not provide for any regulation so that it was on its face a revenue measure solely.

The Supreme Court of Utah held that under a grant of powers to the counties empowering them to require a license for the purpose of regulation and revenue, the counties had no right to require a license for the purpose of revenue only; that the grant merely empowered the counties to license for the purpose of regulation and that if revenue resulted incidently this was permissible.

The Court say: "So a right to license a business or occupation does not imply a right to exact a tax merely for revenue and where the object is revenue the power to license for that purpose must be conferred in unequivocal terms. "License" in

general implies privilege and regulation and the imposition of it falls within the police power of the state.

In the case of *State v. Smith*, the court had before it an ordinance of the City of Bridgeport. The charter of the town of Bridgeport authorized the City of Bridgeport to license cartmen, truckmen, hackmen, butchers, bakers, petty grocers, hucksters and common victualers under such restrictions and limitations as said common council might deem necessary and proper to the health of the city, and to make other ordinances relative "to any and all subjects which shall be deemed necessary and proper for the protection and preservation of the lives of the citizens." The city council under this grant of power enacted an ordinance requiring a license from all milkmen. The court held that this ordinance was not authorized, under the general welfare clause, nor under the provision above referred to and was therefore void. The court say:

"The right to license the pursuit of a lawful business, which as usually carried on does not endanger the public health or safety, and thus to limit the number of those who may engage in it, is one of the highest powers of sovereignty. When conferred upon a municipal corporation, the grant can not be extended by any doubtful implication."

THE VALIDITY OF THE ACT AS AFFECTED
BY THE FACT THAT IT WAS PASSED BY
THE LEGISLATURE AFTER IT HAD
BEEN IN SESSION MORE THAN
SIXTY DAYS

The Organic Act provides as follows: "That the Legislature shall convene at the capitol at city of Juneau, Alaska, on the first Monday in March in the year nineteen hundred and thirteen, and on the first Monday in March every two years thereafter; but the said legislature shall not continue in session longer than sixty days in any two years."

It was agreed that the Legislature went into session at noon on March 1, 1915, and that the act was passed on April 30, 1915, between the hours of 3 and 4 in the morning sun time, and that the clocks in the halls of the legislature had been stopped or turned back so as to indicate an hour prior to midnight of the previous day. It was further agreed that no extra session was called.

It will be observed that the language of the act is mandatory in this regard. It is urged, however, that since the legislature convened at noon sixty days had not expired until noon of the day on which the act was passed. The answer to this is that the law knows no fractions of days, but in calculating time counts each fraction of a day as a whole day.

It is further urged that since the record kept by the Legislature shows the law to have passed on the

previous day, it must be presumed to have been then passed, as the records kept by a legislative body are conclusive upon the courts. The answer to this contention is that if the legislature adjourns by operation of law at midnight, three or four hours before the act was passed, the record is not a record kept by a legislative body, since that body had adjourned and ceased to exist as such prior to the time the act was passed. The record ^{that} imports verity is the record of a legislature not the record kept by a body of men that at one time composed a legislature.

II.

THE VALIDITY OF THE ACT AS DETERMINED BY THE CONSTITUTION OF THE UNITED STATES.

It is contended that the provisions of the act are such as to deny to the Alaska Pacific Fisheries the equal protection of the laws and further that under it private property is taken without compensation and the Alaska Pacific Fisheries Company is deprived of property without due process. These propositions will be discussed in their order.

II—A.

AS DENYING THE EQUAL PROTECTION OF THE LAWS

It is agreed that some of the salmon fisheries operating in Alaska are so situated owing to natural conditions that the supply of fish necessary to keep

the canning plant in operation can be caught only by the use of seines, and that others are so situated owing to natural conditions that this supply can be caught only by resorting to the use of fish traps. It is further agreed that the Alaska Pacific Fisheries owns and operates three canneries in Alaska so situated, owing to natural conditions that it cannot use seines in catching the fish canned by it but is obliged to resort to the use of fish traps for that purpose. The act of 1915 does not impose a tax on seines or on those engaged in fishing by means of seines but taxes fish traps at the rate of one hundred dollars each. The learned trial Judge construed the act to levy a tax on those engaged in the business of fishing by means of fish traps, but for the purpose of this discussion it is not material which construction is adopted.

It is contended that this is an unjust discrimination in favor of the fisheries so situated because of natural conditions that they can catch their fish supply by the use of seines and against those so situated because of natural conditions that they are obliged to employ fish traps for this purpose. The product of one of these classes of fisheries meets the produce of the other class in the markets of the world. Here each must compete with the other. If one is required to pay a tax which the other is not required to pay, the product of the former exceeds the product of the latter in costs of production to the extent of the tax paid, for obviously any tax paid

by one carrying on such business, whether assessed against the business or against the appliance by which the business is conducted, forms a part of the cost of the product. If, therefore, one is obliged to pay a tax not required from the other, the more fortunate competitor is not only enabled to make a larger profit than the other, but he is enabled to undersell such other and if he desires to do so to drive him out of the market altogether and thus secure a monopoly for himself. The statement that one competitor having an advantage over others, regardless of the fact that such advantage may be slight, can drive such other out of the market and secure a monopoly for himself, finds ample support in the history of rate discrimination. Clearly it cannot matter whether the additional cost of the commodity offered in the market is due to an extra rate charged by a transportation company or to an extra tax charged by the government. In either case the result is unjust discrimination, the ultimate and natural effect of which is monopoly. A law which in its operation has this effect not only denies the equal protection of the laws but has the effect of abridging the privileges and immunities to which citizens of the United States are entitled. This precise question was passed upon by the Federal Court in the case of *In Re Yot Sang*, 75 Fed. 983.

This case arose in the state of Montana. The legislature of that state had passed an act requiring laundries that were operated by hand to pay a li-

cense of \$25 per annum and requiring laundries that were operated by steam to pay a license fee of \$15 per annum. It will be noted that the effect of this law is precisely the same as the effect of the Alaska License Law. The amount of the license fee is determined by the methods employed in operating the business. In Montana, laundries operated by hand were required to pay a license fee of \$25. In Alaska, salmon fisheries operated by the use of fish traps are required to pay a license tax of \$100 on each trap employed. In Montana, laundries operated by steam were required to pay a license fee of \$15 per annum. In Alaska salmon fisheries operated by the use of seines are not required to pay any license fee whatsoever. This act of the State of Montana was held to be in violation of the Fourteenth Amendment and was declared void. The reasons given for the decision are as applicable to the facts in the case at bar as they were to the facts in the case then before the court. In the course of the opinion it is said:

“It is urged, however, that where the same business is conducted by different modes, it is unjust, and in violation of the rule that each man should have the protection of equal laws, to place upon one a greater burden than upon the other. If the mode of conducting a business is subject to a license, then all progress could be delayed. It seems to me that in this case it appears that an additional burden is cast upon those conducting the business of a laundry oth-

er than by steam, where one or more persons are employed, than is imposed upon those conducting a steam laundry, and that no conditions are presented which would justify the state in adding this additional burden. It is therefore held that the arresting of Yot Sang for the refusal to take out a license, and pay therefor \$25 before he could conduct a laundry business in which one or more persons were employed, the same being other than steam, was void, by virtue of the said Fourteenth Amendment to the Constitution."

The question of what constitutes a proper classification is well illustrated by the decision ^{*in a case*} that arose in Nebraska and was tried before the Federal Court there. A city council had passed an ordinance requiring a license tax from gas companies and also from electric light and power companies. The fee or tax exacted was not the same in each case. The electric companies and the gas companies both sold light, heat and power in the same city so that one was a competitor of the other, just as the salmon canneries in Alaska are of course obliged to sell their product in competition one with the other. The decision was not based upon any provisions of the Fourteenth Amendment but upon a provision contained in the Nebraska Constitution requiring uniformity of taxes upon the same class of subjects, and this is in effect what the Fourteenth Amendment requires. Under the provisions of the Fourteenth Amendment

it is not necessary that all persons, however situate, shall be taxed alike, but it is necessary that all those belonging to the same class shall be taxed alike and this was the requirement of the Nebraska Constitution. The Court held the ordinance void as being obnoxious to this provision of the Nebraska Constitution. *Lincoln Gas Company, etc., v. City*, 182 Fed. 927.

II—B.

UNDER ACT PERSONS ARE DEPRIVED OF PROPERTY WITHOUT DUE PROCESS AND PRIVATE PROPERTY IS TA- KEN WITHOUT COMPEN- SATION

It was agreed that while some of the fish traps of the Alaska Pacific Fisheries are worth as much as ten thousand dollars others are not worth to exceed one thousand dollars. The law taxes these traps at the rate of one hundred dollars each regardless of their value, so that the fish traps worth not to exceed one thousand dollars are taxed at the rate of ten per cent. To secure the payment of this tax the Territory is given a lien on the property taxed, under which it may be sold. This tax is so unreasonably high as to be confiscatory, its exaction deprives persons of property without due process and a sale of the property taxed to enforce payment of the tax amounts to nothing less than the taking of private property without compensation.

III.

WHETHER PLAINTIFF IN ERROR IS REQUIRED TO PAY A TAX UNDER THE PROVISIONS OF THE ACT

The plaintiff in error it is agreed is engaged in the business of operating three salmon canneries so situated because of natural conditions that it is obliged to resort to the use of fish traps in order to catch the fish required at its canneries for canning purposes. It is agreed that the plaintiff in error is not otherwise engaged in the fish trap business. Under this statement of facts the plaintiff in error cannot be said to be in the fish trap business or in the business of fishing by means of fish traps, it is engaged in the salmon canning business and the fish trap is a mere appliance used by it in carrying on that business. Just as a farmer using a plow to till his soil cannot be said to be in the plow business, but is engaged in the farming business notwithstanding the fact that the plow is one of the appliances used by him in carrying on that business, so a cannery man is engaged in the cannery business, notwithstanding the fact that a fish trap is one of the appliances used by him in carrying on that business.

IV.

WHETHER THE PLAINTIFF CAN BE LIABLE
FOR TAXES UNDER ACT OF 1915 IN VIEW
OF THE PROVISION OF THE ACT
OF JUNE 1906 AND A COM-
PLIANCE THEREWITH

The act of June provides as follows:

“That every person, company, or corporation carrying on the business of canning, curing or preserving fish or manufacturing fish products shall, in lieu of all other license fees and taxes therefor and thereon, pay license taxes on their said business and output as follows”

No law passed since its enactment either by Congress or the Territorial Legislature contains any provision repealing it either in whole or in part. The plaintiff in error is engaged in the canning business and has paid the tax provided for on its product, which the act says shall be in lieu of all other taxes and licenses. The traps sought to be taxed in this case are mere appliances used in carrying on the salmon canning business on which the tax is paid in lieu of all other taxes and licenses. Clearly the laying of a tax against the appliances used in carrying on a business amounts to nothing less than a tax on the business in connection with which the appliances are used. To collect a tax on such appliances when no tax could be collected on the business

in connection with which they are used would be to do by indirection that which could not be done directly.

The judgment of the lower court should for the reasons urged be reversed. The tax laid under the act of the Territorial Legislature can not be considered other than a specific property tax, which fails to conform to the requirements of the Organic Act in that it is not uniform upon the same class of subjects, in that it is not based upon an assessment, and, in that it is not assessed according to value. But whether viewed as a property tax or a license tax does not materially affect the validity of the tax itself, for if regarded as a license tax it is also void for a failure to comply with these same requirements of the Organic Act. In no case is it uniform upon the same class of subjects, in no case is it based upon an assessment and in no case is it assessed according to value.

Again the tax is laid in violation of the provisions of the Federal constitution. Viewed as a property tax or a license tax it discriminates against those salmon canneries or fisheries who use traps to procure their fish supplies in favor of those using seines for this same purpose, and is confiscatory in its nature in that it exacts in some cases a tax as high as ten per cent.

Furthermore the law levying the tax is void because passed by the members of the legislature after the legislature had by operation of law adjourned.

Nor is the plaintiff in error engaged in a business that would make it subject to the tax sought to be imposed, it being engaged in the salmon canning business and not in the fish trap business. In any event the plaintiff in error, having paid a tax on its output as required by the act of congress, "in lieu of all other taxes," should not now be required to pay a tax on the appliances used by it in connection with its such business.

Respectfully submitted,

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff in Error.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE FIRST NATIONAL BANK OF
PORTLAND, OREGON, a Corporation,

Appellant

vs.

E. J. DODGE COMPANY, a Corporation,

Appellee

TRANSCRIPT OF RECORD

On Appeal from the District Court of the United States
for the District of Oregon

Filed

DEC 24 1915

F. D. Monckton,
Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

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*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

THE FIRST NATIONAL BANK OF PORT-
LAND, OREGON, a corporation,
Appellant,

vs.

E. J. DODGE COMPANY, a corporation,
Appellee.

Names and Addresses of the Attorneys of Record.

DOLPH, MALLORY, SIMON & GEARIN, Mohawk
Building, Portland, Oregon, for the Appellant.

F. A. CUTLER, 617 Underwood Building, San
Francisco, California, for the Appellee.

Citation on Appeal.

United States of America,
District of Oregon,—ss.

To E. J. Dodge Company, a corporation created and
existing under and by virtue of the laws of the
State of California, and having its principal
place of business in the City of San Francisco,
Greeting:

Whereas, The First National Bank of Portland,
Oregon, has lately appealed to the United States
Circuit Court of Appeals for the Ninth Circuit
from an order granting an injunction rendered in

the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law; you are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said order should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, Oregon, in said District, this 23d day of November, in the year of our Lord, one thousand nine hundred and fifteen.

CHAS. E. WOLVERTON,
Judge.

E. J. DODGE COMPANY, a corporation,
Plaintiff,

vs.

FIRST NATIONAL BANK OF PORTLAND,
Defendant.

I, F. A. Cutler, solicitor for plaintiff, do hereby acknowledge due service upon me of a duly certified copy of the Annexed Citation in the above entitled case, at San Francisco, California, on this 25th day of November, A. D. 1915; and I further acknowledge receipt of duly certified copies of (a) Appeal from Order Allowing Appeal; (b) Order Allowing Appeal; (c) Bond on Appeal; and (d) Assignment

of Errors, in said suit served upon me at the same time and place.

F. A. CUTLER,
Solicitor for Plaintiff.

Filed December 6, 1915. G. H. Marsh, Clerk.

*In the District Court of the United States for the
District of Oregon.*

November Term, 1915.

BE IT REMEMBERED, that on the 17th day of November, 1915, there was duly filed in the District Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit:

BILL OF COMPLAINT.

*In the District Court of the United States in and
for the District of Oregon.*

E. J. DODGE COMPANY, a corporation created and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of San Francisco,

Plaintiff,

vs.

THE FIRST NATIONAL BANK OF PORTLAND, OREGON, a corporation organized and existing under and by virtue of the

laws of the United States of America, and having its principal place of business in and located at the City of Portland, in said State of Oregon,

Defendant.

To the Honorable the Judges of the District Court of the United States, in and for the District of Oregon.

E. J. Dodge Company, a corporation organized under and pursuant to the laws of the State of California, and having its principal place of business in the City of San Francisco in said state, brings this its bill of complaint against The First National Bank of Portland, Oregon, a corporation organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in and located at the City of Portland in said State of Oregon, and thereupon your orator complains and alleges as follows:

I.

That your orator, E. J. Dodge Company, at and during all of the times hereinafter mentioned, was and now is a corporation duly created and existing under and by virtue of the laws of the State of California, having its principal place of business in the City of San Francisco in said state, and is now a citizen and resident of said state.

II.

That the said defendant at and during all the

times hereinafter mentioned, was and now is a national banking corporation duly organized and existing under and by virtue of the laws of the United States of America, having its principal place of business in and located at the City of Portland in said state, and is now a resident and citizen of said State of Oregon.

III.

That your orator, E. J. Dodge Company, was incorporated on the 24th day of September, 1902, under and by virtue of the laws of the State of California, for the purpose, among other things, of erecting, constructing and owning all kinds of structures, buildings, vessels, mills, including lumber mills, mill plants, machinery, and to purchase and own timber lands, and any and all kinds of appliances necessary to operate any and all such mills, plants, machinery and appliances, and to carry on a general lumber and timber manufacturing and dealing business, and ever since has been and now is engaged in such business; that it was incorporated with a capital stock of \$300,000 and the number of shares into which it was and is divided, is 3000 shares, of the par value of \$100 per share, all of which capital stock was and has been actually subscribed, and certificates of stock duly issued therefor.

IV.

That during all of the times herein mentioned, one E. D. Porter was the manager, secretary and

treasurer of said plaintiff and was also a director thereof.

V.

That on or about September 25, 1914, as your orator is informed and believes, said defendant was the owner and possessor of 200 shares of the capital stock of the said plaintiff, and entered into an agreement with said E. D. Porter purporting to represent the said plaintiff, wherein the said defendant was to sell said 200 shares of said stock to said plaintiff for the sum of Forty-one Thousand Dollars, and said plaintiff was to purchase the said stock from said defendant paying therefor the said sum of Forty-one Thousand Dollars; that in carrying out the terms of said agreement and for the purpose of paying the purchase price thereof, the said E. D. Porter caused to be executed in the name of said corporation, certain promissory notes under date of September 25, 1914, at San Francisco, State of California, as follows, to-wit:

1. A promissory note executed by E. J. Dodge Company made payable to the First National Bank of Portland, Oregon, in the sum of \$10,000 payable one year after date with interest payable semi-annually at the rate of five per cent thereon.

2. A promissory note executed by E. J. Dodge Company made payable to the First National Bank of Portland, Oregon, in the sum of \$10,000 payable two years after date

with interest payable semi-annually at the rate of five per cent thereon.

3. A promissory note executed by E. J. Dodge Company made payable to the First National Bank of Portland, Oregon, in the sum of \$10,000 payable three years after date with interest payable semi-annually at the rate of five per cent thereon.

4. A promissory note executed by E. J. Dodge Company made payable to the First National Bank of Portland, Oregon, in the sum of \$11,000 payable four years after date with interest payable semi-annually at the rate of five per cent thereon.

And, thereupon delivered said promissory notes to said defendant, the First National Bank of Portland, Oregon, which ever since has been and now is in possession of said notes claiming to own and hold the same; that the said E. D. Porter, nor the said plaintiff, ever received said shares of stock from the said defendant, and the same were to remain in the possession of said defendant until said promissory notes were fully paid, when the same were thereupon to be delivered to plaintiff.

VI.

That the said E. D. Porter had no right or authority from plaintiff, or otherwise, to make and execute on behalf of plaintiff, said agreement of purchase and sale of said shares of stock with defendant, and had no right or authority to make,

execute and deliver on behalf of and in the name of plaintiff said promissory notes to said defendant, or to make any payments thereon; that the said agreement of purchase and sale of said stock was entered into and said promissory notes executed and delivered by said E. D. Porter on behalf of the said plaintiff, without the knowledge, consent or ratification of the board of directors or any of the stockholders of said plaintiff other than said E. D. Porter; that neither a record of said agreement nor a record of said promissory notes was ever entered in the books of said plaintiff, and the directors and stockholders of said company never acquired any knowledge of the same until on or about the 26th day of October, 1915, when they at once disapproved and disaffirmed the said transaction, and directed that a proper action be commenced to have said agreement of purchase and sale of said stock declared void, and have said promissory notes cancelled and surrendered, and to have a recovery of the money paid thereon.

VII.

Your orator further alleges that the agreement to purchase its own stock by the said plaintiff from the said defendant is illegal and void as in violation of the provisions of Section 309 of the Civil Code of the State of California, prohibiting directors of corporations from reducing the capital stock. The phrase "capital stock" as used in this section, has been construed by the Supreme Court of the State of California to mean not the shares

of which the nominal capital is composed, but the actual capital, i. e., assets with which the corporation carries on its corporate business.

See *Schulte vs. Boulevard Gardens Co.*, 164 Cal. 464, and cases there cited.

And your orator further alleges that said promissory notes purporting to be executed by plaintiff were executed without consideration, and each one is wholly void and of no effect.

VIII.

And your orator further alleges that said 200 shares of stock, the subject of said purchase and sale by and between your orator and said defendant as aforesaid, have been at all the times mentioned in this bill of complaint, and are now in the custody and possession of said defendant, and have never been transferred on the books of said plaintiff to your orator, or to anyone else, and the said plaintiff does hereby relinquish all right, title, claim and interest in and to said 200 shares of stock and consents that the title to and possession of said shares of stock may remain in and with said defendant.

IX.

And your orator further alleges that the said E. D. Porter in carrying out the terms of said agreement, has paid to said defendant from the funds of plaintiff, on account of principal and interest on said promissory notes, the following sums, to-wit:

December	31, 1914.....	\$ 512.50	Interest
March	27, 1915.....	512.50	Interest
July	9, 1915.....	512.50	Interest
October	16, 1915.....	512.50	Interest
October	16, 1915.....	5000.00	Principal

which sums of money belonging to plaintiff, the said E. D. Porter had no right or authority to use in making said payments, and the said defendant has never returned nor repaid the same to plaintiff and now retains the same and is indebted to plaintiff in the full amount thereof, to-wit, the sum of Seven Thousand and Fifty-four Dollars (\$7,054).

X.

That said promissory notes and each of them were and are negotiable in form and each one upon its face purports to have been made by said plaintiff for a valuable consideration, and bears the imprint of the corporate seal of said plaintiff, and nothing shows thereon the purpose or consideration for which said notes or any of them were issued, and as your orator is informed and believes, said defendant intends to and threatens to negotiate, dispose of and transfer to bona fide purchasers for value, said promissory notes if not restrained and prevented therefrom by an order of this court *pendente lite*; that said negotiation, transfer and disposal of said promissory notes by said defendant would cause plaintiff irreparable loss and injury, and irremediable and gross injustice; and your orator is further informed and therefore believes, that the said defendant intends to enforce the collection of

said promissory notes as they become due from said plaintiff, and to that end will commence an action for that purpose against plaintiff in either the State Court of Oregon or the District Court of the United States in and for the District of Oregon, unless restrained and prevented by an order of this Honorable Court.

Forasmuch as your orator can have no adequate relief, except in this court, and to the end, therefore, that the defendant may, if it can, show why your orator should not have the relief hereby prayed, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged;

And that your Honors may grant a writ of injunction issued out of and under the seal of this Court, perpetually enjoining and restraining the said defendant, its clerks, attorneys, agents and servants from negotiating, transferring or disposing of said promissory notes, and from instituting or prosecuting any action in any State Court or United States Court against plaintiff to enforce the payment of said promissory notes;

And that your Honors may render a decree cancelling and ordering defendant to surrender to plaintiff said promissory notes;

And that your Honors render a decree in favor of plaintiff and against defendant, in the sum of

Seven Thousand Fifty-four Dollars (\$7054).

And your orator further prays that a provisional or preliminary injunction be issued restraining and enjoining the said defendant, its clerks, attorneys, agents and servants from negotiating, transferring or disposing of said or any of said promissory notes, pending this cause, and that a provisional or preliminary injunction be issued restraining the said defendant, its clerks, attorneys, agents and servants from instituting or prosecuting any action in any State or United States Court against plaintiff, for the payment of said or any of said promissory notes, and for such other and further relief as the equity of the case may require, and which to your Honors may seem meet.

May it please your Honors to grant unto your orator, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena of the United States of America, directed to the said defendant, commanding it on a certain day to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

F. A. CUTLER,
Solicitor for Complainant.

State of California,
City and County of San Francisco,—ss.

On this 13th day of November, 1915, before me personally appeared H. E. Hunt, general manager of the complainant above named, who being by me duly affirmed, deposes and says, that he is the general manager of the E. J. Dodge Company, and familiar with its business, and that he has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

H. E. HUNT.

Affirmed and subscribed before me this 13th day of November, 1915.

(Seal)

H. F. ROBSON,

Notary Public in and for the City and County of San Francisco, State of California.

Filed, November 17, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on Wednesday, the 17th day of November, 1915, the same being the 15th Judicial day of the Regular November Term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

Order to Show Cause and Restraining Order.

In the District Court of the United States in and for the District of Oregon.

No. 6984.

E. J. DODGE COMPANY, a corporation created and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of San Francisco,

Plaintiff,

vs.

THE FIRST NATIONAL BANK OF PORTLAND, OREGON, a corporation organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in and located at the City of Portland, in said State of Oregon,

Defendant.

On reading the verified Bill of Complaint in the above entitled action, a copy of which is hereto attached, it is ordered that the said defendant,

First National Bank of Portland, Oregon, show cause, on Saturday, the 20th day of November, 1915, at ten o'clock A. M., or as soon thereafter as counsel can be heard, before the United States District Court for the District of Oregon, at the City of Portland, why the injunction *pendente lite* prayed for in said Bill of Complaint, should not be granted, and it appearing to the court from said verified Bill of Complaint that immediate and irreparable loss or damage will result to the plaintiff before the matter can be heard on notice,

It is further ordered, that in the meantime, the said defendant, its clerks, attorneys, agents and servants, be restrained from doing any of the following acts:

1. Negotiating, transferring or disposing, by endorsement, assignment or otherwise, any of the promissory notes mentioned in said Bill of Complaint herein and more particularly described as follows, to wit:

Four promissory notes executed by the plaintiff in favor of the defendant above named, under date of September 25, 1914, at the City of San Francisco, State of California, as follows:

A promissory note executed by E. J. Dodge Company made payable to the First National Bank of Portland, Oregon, in the sum of \$10,000 payable one year after date with interest payable semi-annually at the rate of five per cent thereon.

A promissory note executed by E. J. Dodge Company made payable to the First National Bank of Portland, Oregon, in the sum of \$10,000 payable two years after date with interest payable semi-annually at the rate of five per cent thereon.

A promissory note executed by E. J. Dodge Company made payable to the First National Bank of Portland, Oregon, in the sum of \$10,000 payable three years after date with interest payable semi-annually at the rate of five per cent thereon.

A promissory note executed by E. J. Dodge Company made payable to the First National Bank of Portland, Oregon, in the sum of \$11,000 payable four years after date with interest payable semi-annually at the rate of five per cent thereon.

2. Instituting or prosecuting any action in any State or United States Court against plaintiff by defendant to enforce the payment of said promissory notes.

CHAS. E. WOLVERTON,
Judge.

Dated: November 17, 1915. Filed, November 17, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 20th day of November, 1915, there was duly filed in said court and cause, an Affidavit of E. A. Wyld, in words and figures as follows, to wit:

Affidavit of E. A. Wyld.

*In the District Court of the United States for the
District of Oregon.*

E. J. DODGE COMPANY, a corporation created and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of San Francisco,

Plaintiff,

vs.

FIRST NATIONAL BANK OF PORTLAND, OREGON, a corporation organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in and located at the City of Portland, in the State of Oregon,

Defendant.

United States of America,
District of Oregon,—ss.

I, E. A. Wyld, being first duly sworn, say on oath, that I am vice president and cashier of the First National Bank of Portland, defendant in the above entitled suit; that I have read the Bill of Complaint filed in this suit, and the several allega-

tions therein contained; that it is true as alleged in the fifth paragraph of said Bill of Complaint that the defendant was the owner and in possession of two hundred (200) shares of the capital stock of plaintiff corporation on or about September 25, 1914, and that it entered into an agreement with the plaintiff, represented by E. D. Porter, who was the manager, secretary and treasurer of said plaintiff corporation, by the terms of which this defendant was to and did sell to said plaintiff 200 shares of the capital stock of said plaintiff corporation for the sum named in said bill of complaint to be paid for as therein alleged, and that said shares of stock were to be retained by the defendant as collateral security until the promissory notes executed by the plaintiff mentioned in said bill of complaint should be fully paid.

This affiant says it is untrue and he denies that the said E. D. Porter had no right or authority from the plaintiff to make or execute on behalf of the plaintiff the agreement to purchase as aforesaid, and it is also untrue and this affiant denies that the said E. D. Porter had no right or authority to make, execute and deliver on behalf of or in the name of the plaintiff the promissory notes in the bill of complaint described, or to make payments thereon; and this affiant further says that it is untrue and he denies that the promissory notes executed and delivered by the plaintiff through the said E. D. Porter, manager, secretary and treasurer of said corporation, were executed and deliv-

ered without the knowledge, consent or ratification of the board of directors or stockholders of the plaintiff other than said E. D. Porter, and he says that it is untrue and denies that no record of said agreement or of said promissory notes was entered in the books of the plaintiff and this affiant denies that the directors or stockholders of the company acquired no knowledge of the same until about the 21st day of October, 1915, at which date it is alleged in the bill of complaint that they disapproved and disaffirmed said transaction and directed that a suit be commenced to have said agreement or purchase and sale of said stock declared void.

This affiant further deposes and says that said plaintiff corporation purchased and acquired said 200 shares of stock in good faith and for full value and acted with full knowledge of all the circumstances surrounding the transaction and said plaintiff corporation deemed it advantageous for it to acquire said stock. That this defendant acquired said stock and obtained title thereto in pursuance of an understanding and agreement had with the plaintiff that it would so acquire and obtain title to said stock and sell the same to the plaintiff, and the sale of said stock by defendant to plaintiff was in pursuance of said agreement and understanding. That the negotiations for the acquisition of said stock by defendant and the subsequent sale thereof to the plaintiff were had with the said E. D. Porter who, as hereinbefore alleged, was the manager, secretary and treasurer of said corporation and a

director therein and acted for said corporation, and who had, as this affiant verily believes, full authority to so act. That attached hereto, marked Exhibit "A," is a copy of the resolution adopted by the board of directors of said plaintiff corporation at a meeting thereof held on September 25, 1914, a certified copy of which resolution will be submitted to this Honorable Court for its inspection.

E. A. WYLD.

Subscribed and sworn to before me this 20th day of November, A. D. 1915.

(Seal)

B. B. McCARTHY,

Notary Public for Oregon. My Commission expires Oct. 29, 1919.

EXHIBIT "A."

At a special meeting of the directors of the E. J. Dodge Company held at the offices of the company, 16 California St., San Francisco, Cal., September 25th, 1914, the following resolution was passed:

"Whereas, it is considered advisable for the E. J. Dodge Company to purchase 200 shares of its capital stock issued to E. H. Dodge, now owned by the First National Bank of Portland, for the sum of \$41,000.00, the secretary is hereby authorized on behalf of this company to issue three promissory notes for \$10,000.00 each, maturing in one, two, and three years respectively, and one promissory note for \$11,000.00 maturing in four years, to the First National Bank of Portland, Ore., in full payment of this stock."

(Signed) E. D. PORTER,
Secretary.

I hereby certify the above to be a true and correct copy of resolution passed at meeting above stated.

(Signed) E. D. PORTER,
Secretary.

Filed, November 20, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on Saturday, the 20th day of November, 1915, the same being the 18th Judicial day of the Regular November Term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Order for Preliminary Injunction.

In the District Court of the United States in and for the District of Oregon.

E. J. DODGE COMPANY, a corporation created and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of San Francisco,

Plaintiff,

vs.

THE FIRST NATIONAL BANK OF PORTLAND, OREGON, a corporation organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in and located at the City of Portland, in said State of Oregon,

Defendant.

The application of plaintiff for a Preliminary Injunction *pendente lite* in the above entitled action coming on regularly to be heard by the Court on this day, due notice of the time and place of such hearing having been given to defendant as provided for

by rule 73 of Rules of Practice for the Courts of Equity of the United States, F. A. Cutler, Esq., appearing for the plaintiff, and Joseph Simon, Esq., appearing for the defendant, and the matter having been submitted to the Court for its decision upon the verified bill of complaint of plaintiff herein, and the affidavit of E. A. Wyld on behalf of the defendant, and the argument of counsel, and the Court being fully advised in the premises, and it appearing to the Court to be a proper case for a preliminary injunction *pendente lite* to be issued as asked for by plaintiff;

It is hereby ordered that a preliminary injunction be issued under the seal of this Court commanding and enjoining defendant, its solicitors, attorneys, agents and servants to desist and refrain from doing any of the following acts during the pendency of said action, and until further order of the Court, viz:

1. Negotiating, transferring or disposing, by endorsement, assignment or otherwise, any of the promissory notes mentioned in said bill of complaint herein and more particularly described as follows, to wit:

Four promissory notes executed by the plaintiff in favor of the defendant above named, under date of September 25, 1914, at the City of San Francisco, State of California, as follows:

A promissory note executed by E. J. Dodge Company made payable to the First National Bank of Portland, Oregon, in the sum of

\$10,000 payable one year after date with interest payable semi-annually at the rate of five per cent thereon.

A promissory note executed by E. J. Dodge Company made payable to the First National Bank of Portland, Oregon, in the sum of \$10,000 payable two years after date with interest payable semi-annually at the rate of five per cent thereon.

A promissory note executed by E. J. Dodge Company made payable to the First National Bank of Portland, Oregon, in the sum of \$10,000 payable three years after date with interest payable semi-annually at the rate of five per cent thereon.

A promissory note executed by E. J. Dodge Company made payable to the First National Bank of Portland, Oregon, in the sum of \$11,000 payable four years after date with interest payable semi-annually at the rate of five per cent thereon.

2. Instituting or prosecuting any action in any State or United States Court against plaintiff by defendant to enforce the payment of said promissory notes.

This order to become effective upon filing a bond with good and sufficient security in the sum of \$10,000 to pay all costs and damages accruing to defendant by reason of the injunction, if the same be wrongful or without sufficient cause.

CHAS. E. WOLVERTON,
Judge.

Dated November 20, 1915. Filed November 20, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 22nd day of November, 1915, there was filed in said court and cause, a Bond for Preliminary Injunction, in words and figures as follows, to wit:

Bond for Preliminary Injunction.

*In the District Court of the United States for the
District of Oregon.*

E. J. DODGE COMPANY, a corporation created and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of San Francisco,

Plaintiff,

vs.

THE FIRST NATIONAL BANK OF PORTLAND, OREGON, a corporation organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in and located at the City of Portland, in said State of Oregon,

Defendant.

Whereas, the plaintiff in the above entitled suit has applied to the Court for a preliminary injunction *pendente lite* enjoining and restraining the defendant from doing certain acts fully described in the bill of complaint herein, and

Whereas, the Court has made an order of this date granting the motion of the plaintiff for the issuance of a preliminary injunction *pendente lite*

herein and ordering that said preliminary injunction issue on condition that the plaintiff give to the defendant an undertaking in the sum of Ten Thousand Dollars (\$10,000) to the effect that it will pay all costs and disbursements that may be decreed to the defendant and such damages, not exceeding such amount, as defendant may sustain by reason of the injunction if the same be wrongful or without sufficient cause;

Now therefore, the New Amsterdam Casualty Company, a corporation organized and existing under and by virtue of the laws of the State of New York, does hereby undertake with the defendant in the sum of Ten Thousand Dollars (\$10,000), that it will pay all costs and disbursements that may be decreed to the defendant in the above entitled action, and such damages, not exceeding said sum of \$10,000.00 as it may sustain by reason of the injunction if the same be wrongful or without sufficient cause.

Signed, sealed and delivered this 20th day of November, 1915.

NEW AMSTERDAM CASUALTY COMPANY,
(Seal)

E. L. ENSIGN,
Attorney in Fact.

Examined and approved this 22d day of November, 1915.

CHAS. E. WOLVERTON,
Judge.

Filed, November 22, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 22nd day of November, 1915, there was issued out of said court and cause a Preliminary Injunction, in words and figures, as follows, to wit:

Preliminary Injunction.

*In the District Court of the United States for the
District of Oregon.*

E. J. DODGE COMPANY, a corporation created and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of San Francisco,

Plaintiff,

vs.

THE FIRST NATIONAL BANK OF PORTLAND, OREGON, a corporation organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in and located at the City of Portland, in said State of Oregon,

Defendant.

The President of the United States of America, to
The First National Bank of the City of Portland, Oregon, your solicitors, attorneys, agents and servants, Greeting:

Whereas, on the 20th day of November, 1915, an order was made by the Honorable Chas. E. Wolverton, Judge of the said District Court of Oregon,

commanding and enjoining you, your solicitors, attorneys, servants and agents to desist and refrain from doing certain acts in said order and hereinafter more particularly mentioned, during the pendency of said action and until the further order of said Court,

Therefore this is to command you, said defendant, your solicitors, attorneys, servants and agents during the pendency of the above entitled action and until the further order of said Court, to absolutely desist and refrain from:

1. Negotiating, transferring or disposing, by endorsement, assignment or otherwise, any of the promissory notes mentioned in said bill of complaint herein and more particularly described as follows, to wit:

Four promissory notes executed by the plaintiff in favor of the defendant above named, under date of September 25, 1914, at the City of San Francisco, State of California, as follows:

A promissory note executed by E. J. Dodge Company made payable to the First National Bank of Portland, Oregon, in the sum of \$10,000 payable one year after date with interest payable semi-annually at the rate of five per cent thereon.

A promissory note executed by E. J. Dodge Company made payable to the First National Bank of Portland, Oregon, in the sum of \$10,000 payable two years after date with interest payable semi-annually at the rate of five

per cent thereon.

A promissory note executed by E. J. Dodge Company made payable to the First National Bank of Portland, Oregon, in the sum of \$10,000 payable three years after date with interest payable semi-annually at the rate of five per cent thereon.

A promissory note executed by E. J. Dodge Company made payable to the First National Bank of Portland, Oregon, in the sum of \$11,000 payable four years after date with interest payable semi-annually at the rate of five per cent thereon.

2. Instituting or prosecuting any action in any State or United States Court against plaintiff by defendant to enforce the payment of said promissory notes.

Witness the Honorable CHAS. E. WOLVERTON, Judge of the District Court of the United State in and for the District of Oregon, and the Seal of said Court, this 22d day of November, 1915.

(Seal)

G. H. MARSH,

Clerk.

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed Preliminary Injunction on the therein-named The First National Bank of Portland, Oregon, by handing to and leaving a true and correct copy thereof with C. F. Adams as Vice President of said First National Bank, Portland, Oregon, personally at Portland in said District on the 22nd day of November, A. D. 1915.

JOHN MONTAG,
U. S. Marshal.

By Tinnies DeBoest,
Deputy.

Returned and filed November 22, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 23rd day of November, 1915, there was duly filed in said court and cause, a Petition for Appeal, in words and figures as follows, to wit:

Petition for Appeal.

*In the District Court of the United States for the
District of Oregon.*

IN EQUITY—No. 6984.

E. J. DODGE COMPANY, a corporation created and existing under and by virtue of the laws of the State of California, and having its principal place of business in the

City of San Francisco,

Plaintiff,

vs.

THE FIRST NATIONAL BANK OF PORTLAND, OREGON, a corporation, organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in and located at the City of Portland, in the State of Oregon,

Defendant.

The above named defendant, The First National Bank of Portland, conceiving itself aggrieved by the order entered on November 20th, 1915, in the above entitled cause, wherein said District Court of the United States for the District of Oregon, ordered and adjudged that a preliminary injunction issue under the seal of said Court demanding and enjoining the defendants, its solicitors, attorneys, agents and servants to desist and refrain from negotiating, transferring or disposing by endorsement, assignment or otherwise, any of the promissory notes mentioned in the bill of complaint in said order particularly described, and enjoining said defendant from instituting or prosecuting any action to enforce payment of said promissory notes, doth hereby appeal from said order to the United States Court of Appeals for the Ninth Circuit, and it prays that this its appeal may be allowed and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United

States Circuit Court of Appeals for the Ninth Circuit.

DOLPH, MALLORY, SIMON & GEARIN,
Solicitors for the Defendant and Appellant,
The First National Bank of Portland.

And now, to wit, on November 23, 1915, it is ordered that an appeal be allowed as prayed for.

CHAS. E. WOLVERTON,
Judge.

Copy of the within Petition for Appeal, together with Copy of Assignment of Errors, Order Allowing Appeal, and Bond on Appeal deposited in my office for service on attorney for plaintiff under Rule 9 of the Rules of this Court.

G. H. MARSH,
Clerk.

Filed November 23, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 23rd day of November, 1915, there was duly filed in said court and cause, an Assignment of Errors, in words and figures as follows, to wit:

Assignment of Errors.

*In the District Court of the United States for the
District of Oregon.*

IN EQUITY—No. 6984.

E. J. DODGE COMPANY, a corporation created and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of San Francisco,

Plaintiff,

vs.

THE FIRST NATIONAL BANK OF PORTLAND, OREGON, a corporation, organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in and located at the City of Portland, in the State of Oregon,

Defendant.

Assignment of Errors.

And now, on the 23rd day of November, A. D. 1915, came the said defendant, The First National Bank of Portland, by its solicitors, and says that the order directing and allowing the issuance of a writ of injunction in said cause and restraining

the defendant from negotiating, transferring or disposing by endorsement, assignment or otherwise of the promissory notes described in the bill of complaint and enjoining said defendant from instituting or prosecuting any action to enforce payment of said promissory notes, is erroneous and against the just rights of said defendant, for the following reasons:

First. Because it appears from the face of the bill of complaint that there is no sufficient cause shown why an injunction should issue in this cause;

Second. Because the evidence submitted upon the application for an injunction showed that plaintiff was not entitled to the relief prayed for in its bill of complaint, nor to the granting of the preliminary injunction applied for; and plaintiff's conduct estopped it from any such relief;

Third. No sufficient showing has been made to justify the granting of an injunction in this cause;

Wherefore, the said defendant prays that the said order of the District Court directing the issuance of the writ of injunction be reversed and that said Court may be directed to set aside and annul said order granting an injunction.

DOLPH, MALLORY, SIMON & GEARIN,
Solicitors for the Defendant and Appellant,

First National Bank of Portland.

Filed November 23, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on Tuesday, the 23rd day of November, 1915, the same being the 20th Judicial day of the Regular November Term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

Order Allowing Appeal.

*In the District Court of the United States for the
District of Oregon.*

IN EQUITY—No. 6984.

E. J. DODGE COMPANY, a corporation created and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of San Francisco,

Plaintiff,

vs.

THE FIRST NATIONAL BANK OF PORTLAND, OREGON, a corporation, organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in and located at the City of Portland, in the State of Oregon,

Defendant.

On this 23d day of November, A. D. 1915, came the defendant in the above entitled suit, by its solicitors, and filed herein and presented to the Court its petition praying for an appeal from the

order made and entered in this cause on November 20th, 1915, directing the issuance of a writ of injunction as prayed for in the bill of complaint and praying that a transcript of the record and proceedings and papers upon which the order herein was made, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the Court does allow said appeal upon the defendant giving bond according to law in the sum of Two Hundred and Fifty Dollars.

CHAS. E. WOLVERTON,

Judge.

Filed November 23, 1915. G. H. Marsh, Clerk. And afterwards, to wit, on the 23rd day of November, 1915, there was duly filed in said court and cause, a Bond for Costs on Appeal, in words and figures as follows, to wit:

Bond on Appeal.

In the District Court of the United States for the District of Oregon.

IN EQUITY—No. 6984.

E. J. DODGE COMPANY, a corporation created and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of San Francisco,

Plaintiff,

vs.

THE FIRST NATIONAL BANK OF PORTLAND, OREGON, a corporation, organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in and located at the City of Portland, in the State of Oregon,

Defendant.

Know All Men By These Presents, That we, the First National Bank of Portland, as Principal, and A. L. Mills and C. F. Adams, of Portland, Oregon, as Sureties, are held and firmly bound unto the above named E. J. Dodge Company, corporation, plaintiff, in the sum of Two Hundred and Fifty Dollars (\$250.00) to be paid to the said E. J. Dodge Company, for the payment of which well and truly to be made we bind ourselves, and our and each of our heirs, administrators, and executors, jointly and severally, by these presents.

Sealed with our seals and dated the 23d day of November, A. D. 1915.

Whereas, the above named defendant, First National Bank of Portland, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the order made and rendered in the above entitled suit directing issuance of a preliminary injunction in said cause by the District Court of the United States for the District of Oregon,

Now, therefore, the condition of this obligation is such that if the First National Bank of Portland shall prosecute said appeal to effect and answer all damages and costs if it fail to make such appeal good, then this obligation shall be void; otherwise

the same shall remain in full force and virtue.

FIRST NATIONAL BANK OF PORTLAND,

By A. L. MILLS, President.

A. L. MILLS,

C. F. ADAMS.

Sealed and delivered in presence of
Joseph Simon.

Approved by Chas. E. Wolverton, Judge.

Filed, November 23, 1915. G. H. Marsh, Clerk.

United States of America,

District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on appeal from the order of said court granting a preliminary injunction in the case in which the First National Bank of Portland, Oregon, is appellant, and the E. J. Dodge Company, a corporation, is appellee, in accordance with the rules of the court, and that said transcript is a full, true, and correct transcript of the records of the proceedings had in said court in said cause as the same appear of record and filed in my office and in my custody.

And I further certify that the cost of said transcript is \$. for clerk's fees for preparing said transcript, and \$. for printing the same, and that said costs have been paid by said appellant.

.....
Clerk.

2710

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE FIRST NATIONAL BANK OF
PORTLAND, a Corporation,

Appellant

vs.

E. J. DODGE COMPANY, a Corporation,

Appellee

APPELLANT'S BRIEF

Appeal from the District Court of the United States
for the District of Oregon

Names and addresses of the Attorneys of Record:

DOLPH, MALLORY, SIMON & GEARIN, Mowhawk Bldg., Portland, Ore.

For the Appellant

F. A. CUTLER, 617 Underwood Bldg., San Francisco, California,

For the Appellee

Filed

JAN 28 1916

F. D. Monckton,

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE FIRST NATIONAL BANK OF
PORTLAND, a Corporation,

Appellant

vs.

E. J. DODGE COMPANY, a Corporation,

Appellee

APPELLANT'S BRIEF

**Appeal from the District Court of the United States
for the District of Oregon**

STATEMENT OF THE CASE.

This is an appeal from the order of the District Court directing the issuance of an injunction *pendente lite*.

The complaint alleges in substance that on or about September 25, 1914, one E. D. Porter, who was

manager, secretary and treasurer, and a member of the board of directors of the plaintiff, claiming to represent and act for plaintiff, entered into an agreement with the defendant, who then owned 200 shares of the capital stock of the plaintiff, for the purchase of said stock for the sum of \$41,000, and in payment for said stock, made, executed and delivered to the defendant four promissory notes of the plaintiff corporation, all dated September 25, 1914, bearing interest at five per cent per annum, interest payable semi-annually, and being negotiable in form and bearing the imprint of the corporate seal of the plaintiff, for the several amounts and payable at the times following:

\$10,000 one year after date.

\$10,000 two years after date.

\$10,000 three years after date.

\$11,000 four years after date.

That said shares of stock so purchased by plaintiff was left with defendant as collateral security for the indebtedness aforesaid.

That since the making of said contract, the said E. D. Porter, acting for the plaintiff, paid to the defendant on account of the \$10,000 note maturing September 25, 1915, the sum of \$5,000, leaving \$5,000 still unpaid thereon, and also paid the interest as the same became due on all the notes, interest being paid upon the whole of said indebtedness to October 16, 1915. The bill of complaint further alleges that the said E. D. Porter had no right or authority from plaintiff to execute said agreement or to purchase

said stock, to execute the notes described, or to make any payments on account thereof; that the board of directors had no knowledge of such action, and no record was made on the company's books thereof, knowledge of said transaction being first acquired by the directors on or about October 26, 1915, when they disapproved and disaffirmed the transaction. It is also alleged in the bill of complaint that the agreement to purchase its own stock by plaintiff from defendant is illegal and void and in violation of the provisions of Section 309 of the Civil Code of California, prohibiting directors of corporations from reducing the capital stock, as construed by the Supreme Court in the case of *Schutte v. Boulevard Garden Co.*, 164 Cal. 464.

The bill then prays for a preliminary injunction restraining the defendant from negotiating, transferring or disposing of the promissory notes pending this suit, and from instituting or prosecuting any action upon said notes, etc.

Upon the return day of the order to show cause why a preliminary injunction should not issue, the defendant appeared and filed the affidavit of its vice-president and cashier controverting the material allegations of the complaint, admitting that on or about September 25, 1915, plaintiff, acting by the said E. D. Porter, and defendant entered into and executed the agreement for the sale by defendant to plaintiff of 200 shares of stock as alleged in paragraph V of the complaint, alleging that said E. D. Porter had full authority to act for plaintiff, and

that the directors and stockholders had full knowledge of the transaction and that at a meeting of the board of directors of plaintiff corporation held September 25, 1914, action was taken authorizing the purchase of the stock and execution of the notes in question. (P. 21, Trans. of Record.)

It was further shown by defendant upon the hearing of the application for a preliminary injunction, that the sale of said stock to plaintiff was made in good faith, and for full value; that plaintiff acted with full knowledge of all the circumstances surrounding the transaction and it deemed acquisition of said stock advantageous to it. It was also shown that defendant acquired title to said stock from the prior owner thereof in pursuance of an agreement with plaintiff that it should do so and to thus enable defendant to sell said stock to the defendant. (Affidavit E. A. Wyld, p. 19, Trans. of Record.)

The bill of complaint charges the defendant with no fraud or misrepresentation, and so far as the transaction is disclosed by the complaint, the defendant acted with the utmost good faith. It is, however, alleged that E. D. Porter, the manager, secretary, treasurer and director of the plaintiff, had no authority to purchase the stock or execute the notes, but this allegation is distinctly disproved by the action of the board of directors, as evidenced by the resolution adopted. (P. 21, Trans. of Record.)

The question arising upon this appeal and for this Court to determine is, was the District Court warranted upon the showing made in granting the injunction *pendente lite*?

POINTS AND AUTHORITIES.

An injunction, being the “strong arm of equity,” should never be granted except in a clear case of irreparable injury, and with a full conviction on the part of the Court of its urgent necessity. To justify the Court in granting the relief, it must be reasonably satisfied that there is an actual intention on the part of the defendant to do the act which it is sought to enjoin, or that there is probable ground for believing that, unless the relief is granted, the act will be done.

High on Injunctions, Sec. 22.

It is always a sufficient objection to the granting of an injunction that the party aggrieved has a full and adequate remedy at law, and it is a well established rule that courts of equity will not lend their aid for the protection of rights or the prevention of wrongs where the ordinary legal tribunals are capable of affording sufficient redress. And where it does not appear that the remedy at law is inadequate, or that the party aggrieved is entitled to more speedy relief than can be obtained by the ordinary process of courts of law, an injunction will be refused.

High on Injunctions, Secs. 28, 89.

The object and purpose of a preliminary injunction is to preserve the existing state of

things until the rights of the parties can be fairly and fully investigated and determined upon strictly legal proofs, and according to the course and principles of courts of equity. The prerequisites to the allowance and issuance of such injunction are that the party applying for the same must generally present a clear title, or one free from reasonable doubt, and set forth acts done or threatened by the defendant, which will seriously or irreparably injure his rights under such title, unless restrained. The legal discretion of the judge or court in acting upon applications for provisional injunctions is largely controlled by the consideration that the injury to the moving party, arising from a refusal of the writ, is certain and great, while the damage to the party complained of, by the issuance of the injunction, is slight or inconsiderable.

Blount v. Societe, etc., 53 Fed. 101.

It is the practice of the federal courts to refuse an injunction *pendente lite* unless the case shows beyond reasonable question the necessity for such intervention.

Paul Steam System Co. v. Paul, 129 Fed. 757.

Harriman v. Northern Securities Co., 197 U. S. 244.

Equity will refuse its aid to a complainant who has himself been guilty of the same inequitable conduct with which he charges respondent.

Thompson Co. v. American Law Book Co., 122 Fed. 922.

A party seeking the aid of a court of equity must come with clean hands, and when he asks relief against injustice arising from the bad faith of his adversary, he must not be obnoxious to the same imputation. No man is entitled to the aid of a court of equity, when that aid becomes necessary by his own fault.

Dilly v. Bernard, 8 Gill & J. 170.

Ward v. Hartlet, 178 Mo. 135 (77 S. W. 302).

Sioux City v. Chicago, etc., 129 Iowa, 694 (106 N. W. 183).

The illegality of the contract being disclosed as the groundwork of plaintiff's claim, the court will not relieve from the effect of his own agreement.

Clark on Contracts, 493-4.

Pomeroy's Equity, Secs. 402, 939.

No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself, or more salutary in its effects, than that no one may, to the damage of another, deny the truth of statements and representations by which he has purposely or carelessly induced that other to change his situation. This principle is equitable, because it forbids the untruthful or culpably negligent deceiver from profiting by his own wrong, at the ex-

pense of the innocent purchaser or contractor who believed him. It is salutary, because it represses falsehood and fraud.

Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 293, and cases cited.

A corporation is estopped to question the validity of its void guaranty, because it permitted the circulation of the bonds that carried it. A corporation, quite as much as an individual, is held to a careful adherence to the truth in all their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced.

Zabriskie v. Railroad Co., 23 How. 381, 400, 401.

Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation, and is sued upon the contract, neither is permitted to deny the existence or the legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which oth-

ers have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly regards it.

Casey v. Galli, 94 U. S. 673-680. See cases there cited.

National Bank, etc. v. Stewart, 107 U. S. 676.

ARGUMENT.

The relief sought by plaintiff in its complaint is based upon two grounds:

1. That Porter, who the bill alleges was manager, secretary, treasurer and a director of the plaintiff, had no authority to make the agreement for the purchase of the stock and no authority to execute the notes in the name and on behalf of the corporation.

2. That the plaintiff was prohibited by the laws of California from purchasing its own stock.

This appeal does not necessarily involve the merits of the controversy, yet if it can be shown that there is no equity in the bill and that plaintiff is entitled to no relief, the error of the District Court in awarding a preliminary injunction, will be the more apparent.

“The issue of an interlocutory injunction is never a matter of right, but rests in the sound discretion of the court. In order to obtain one, the plaintiff must show either that there is no doubt of the wrongful nature of the act sought to be enjoined, * * * or that the injury which will result to him from the refusal of the injunction will be very great and that to the defendant from the issue thereof very slight, otherwise an interlocutory injunction will be denied him. * *”

Sec. 294 Foster's Federal Practice.

Sec. 73, Eq. Rules U. S. S. C.

Then, again, "it is an indispensable condition * * that the moving party has not been guilty of a substantial violation of it himself." (167 Fed. 57.)

The plaintiff has sought the intervention of a court of equity, and to entitle it to relief, it must come into court with clean hands. Has it done so? The plaintiff invested E. D. Porter with the apparent authority to transact the business and exercise all the functions pertaining to the offices held by him, and which would ordinarily embrace making the contract in question. If, relying upon such authority, the defendant contracted with E. D. Porter, acting for plaintiff, does it now lie in the power of the corporation to discredit its officer and repudiate the contract made by him on its behalf? The trend of the American and English authorities is to the effect that the corporation would be estopped to impeach the transaction. If the contract be *ultra vires*, a creditor of the corporation whose rights may be injuriously affected, or possibly, a non-assenting stockholder, might seek the relief here applied for, but not the corporation at whose instance the alleged *ultra vires* contract was made. Neither a creditor nor stockholder is complaining, but the corporation making the contract seeks to relieve itself therefrom. This it may not do, for having seen fit to invest its manager, secretary, treasurer and director with the apparent authority to represent and act for it, and to transact the business usually transacted by such officers, it will not be heard thereafter to say to one who, acting in good faith, relying upon such authority,

that such officer acted without authority or exceeded his authority in the transaction in question.

Then, again, when a contract between corporations, or between a corporation and an individual, has been executed by one of the parties and not the other, the delinquent party cannot set up *ultra vires* as a defense. This contract, at least that portion thereof which required the defendant to purchase from the former owner thereof the stock in question so that it might sell the same to the plaintiff, has been completed. It is only when a contract remains wholly executory that the defense of *ultra vires* is available. (*Bissell v. M. S. & N. I. R. R. Co.*, 22 N. Y. 258; *Bradley v. Ballard*, 55 Ill. 413; *Thompson v. Lambert*, 44 Iowa, 239.)

Without intending except in a very general way, to discuss the merits of the controversy involved in this suit arising out of the question whether the purchase of the stock by plaintiff is in violation of Sec. 309, Civil Code of California, we beg to call the Court's attention to the fact that such agreement is not intrinsically immoral or evil. No fraud or deception upon any one was designed by the parties thereto. If such contract was in violation of law, it is so only because the law deems it inexpedient for corporations to acquire by purchase its own stock with corporate funds. But beyond all that, we submit that the facts disclosed by the record upon this appeal show that the contract in question is not condemned by Section 309 of the Civil Code of Califor-

nia, nor is it affected by the decision of the Supreme Court (164 Cal. 464).

It will also be observed from a careful reading of the various cases in which courts have held that corporations are without power to purchase their own stock, that in practically all these cases, the controversy arose over the complaint of creditors or stockholders contending that the purchase of the stock would result in depleting the assets of the corporation and bring about financial embarrassment or ruin. In the California case relied upon by plaintiff as the basis of its complaint in this suit, the Court uses this language:

“All that has been said is subject to the qualification that the rights of creditors are not to be affected by any arrangement between the purchaser of the stock and the corporation. Undoubtedly a creditor of the corporation would be entitled to hold the conditional purchaser as a stockholder and to insist that the amount of his subscription be made applicable to the satisfaction of the corporate debts. In most of the cases cited by appellant, the courts were dealing with states of fact in which the rights of creditors were involved. But no such question arises here; the complaint alleging that the assets of the corporation are greatly in excess of its indebtedness.”

Within the principle announced in the case just cited the sale of the stock made by defendant to plaintiff in pursuance of the previous request made by plaintiff to defendant to acquire the same, is not improper or illegal, but will be sustained.

We also submit that if the contract of purchase and sale complained of by plaintiff is illegal and void, as claimed, the defendant would have a perfect defense in an action at law upon any of the notes that might be sued upon, and therefore plaintiff has no right to resort to equity. Further objection to the relief sought by plaintiff is found in the fact that both corporations, the E. J. Dodge Company and the First National Bank of Portland are solvent, going concerns, and neither the rights of creditors or stockholders can be injuriously affected by the agreement in question, and the defendant is amply able to respond to any just demand that the plaintiff may be able to establish against defendant. For this reason, if there were no other, a preliminary injunction ought not to have been granted, as its denial involved no risk of irreparable injury to plaintiff. (109 Fed. 278.)

In conclusion, we will refer the Court to the language used by Kirkpatrick, J., in *Payne v. U. S. Playing Card Company*, 90 Fed. 544:

“Not only is the right of the complainant to hold the defendant herein to a performance of the contract not clearly shown, but serious objections are raised as to the validity of the contract itseif,—whether it is not void for failure of consideration, or as being contrary to public policy, and whether, if valid, it has not by its terms expired. These are questions that ought not to be decided upon *ex parte* affidavits, nor until the parties have had opportunity to present to the court the fullest proof respecting the

same. The defendant corporation is represented to be of the largest financial responsibility, and it is questionable whether an action at law would not afford the complainant all the relief to which he may be entitled. To grant an injunction at this time would be to determine in advance, in favor of the complainant, all the disputed questions in the case, without giving the defendant an opportunity to be heard. The interference of the court by way of injunction does not seem necessary to preserve any right which the complainant may have."

Respectfully submitted,

DOLPH, MALLORY, SIMON & GEARIN,

Solicitors for Defendant.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE FIRST NATIONAL BANK OF
PORTLAND, OREGON, a Corporation,

Appellant

vs.

E. J. DODGE COMPANY, a Corporation,

Appellee

Brief in behalf of E. J. Dodge Company, Appellee

**On Appeal from the District Court of the United States
for the District of Oregon**

Names and addresses of the Attorneys of Record :

F. A. CUTLER, 617 Underwood Bldg., San Francisco, California,

For the Appellee

DOLPH, MALLORY, SIMON & GEARIN, Mowhawk Bldg., Portland, Ore.

For the Appellant

Filed

FEB 9 - 1916

F. D. Moulton,

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE FIRST NATIONAL BANK OF
PORTLAND, OREGON, a Corporation,

Appellant

vs.

E. J. DODGE COMPANY, a Corporation,

Appellee

Brief in behalf of E. J. Dodge Company, Appellee

**On Appeal from the District Court of the United States
for the District of Oregon**

The Bill of Complaint herein alleges that the E. J. Dodge Company, appellee herein, is and was at all the times mentioned in said Bill, a California corporation having its principal place of business in the City of San Francisco, in said State;

That appellant is and was at all the times mentioned in said complaint, a national banking corporation, hav-

ing its principal place of business in the City of Portland, State of Oregon;

That appellee was incorporated for the purpose, among other things, of carrying on a general lumber manufacturing business, and is and was at all the times mentioned in said complaint, actually engaged in said business;

That it was incorporated with a capital stock of \$300,000, and the number of shares into which it was and is divided, is 3,000 shares, of the par value of \$100 per share, all of which capital stock was and has been actually subscribed, and certificates of stock duly issued therefor;

That on or about September 25, 1914, appellant was the owner and in possession of 200 shares of the capital stock of said appellee, and on that date entered into an agreement with appellee to sell to it said shares of stock for the sum of \$41,000; that appellee, in carrying out said agreement, executed to appellant four promissory notes aggregating said sum of \$41,000, payable, respectively, one, two, three, and four years after date; that upon the execution of said promissory notes they were delivered to said appellant, which ever since has been and now is in possession of said notes, claiming to own and hold the same;

That the agreement to purchase its own stock by said appellee from said appellant, is illegal and void as in violation of the provisions of Section 309 of the Civil Code of the State of California, prohibiting directors of corporations from reducing the capital stock; that the phrase "capital stock," as used in this section, has

been construed by the Supreme Court of the State of California to mean not the shares of which the nominal capital is composed, but the actual capital, i. e., assets with which the corporation carries on its corporate business;

That said 200 shares of stock have been at all the times mentioned in said bill of complaint, and are now in the custody and possession of said appellant, and have never been transferred on the books of said appellee; that under and by virtue of the terms of said agreement the said shares of stock were to remain in the possession of appellant until said notes were fully paid, when the same were thereupon to be delivered to plaintiff;

That said promissory notes and each of them were and are negotiable in form and each one upon its face purports to have been made by said plaintiff for a valuable consideration, and bears the imprint of the corporate seal of said plaintiff, and nothing shows thereon the purpose or consideration for which said notes or any of them were issued, and as your orator is informed and believes, said defendant intends to and threatens to negotiate, dispose of and transfer to bona fide purchasers for value, said promissory notes if not restrained and prevented therefrom by an order of this Court *pendente lite*; that said negotiation, transfer and disposal of said promissory notes by said defendant would cause plaintiff irreparable loss and injury, and irremediable and gross injustice; and your orator is further informed and therefore believes, that the said defendant intends to enforce the collection of said prom-

issory notes as they become due from said plaintiff, and to that end will commence an action for that purpose against plaintiff in either the State Court of Oregon or the District Court of the United States in and for the District of Oregon, unless restrained and prevented by an order of this Honorable Court. (P. 10, R.)

On the filing of this bill, the Court, under Section 73 of the Rules of Practice for Courts of Equity of the United States, issued an order to show cause why the injunction *pendente lite* prayed for in said bill of complaint, should not be granted. (P. 14, R.)

On the 20th day of November, 1915, at ten o'clock a. m., the time mentioned in said Order to Show Cause, the application of plaintiff for a preliminary injunction *pendente lite* was regularly heard by the Court, the respective parties appearing by counsel and the matter having been submitted to the Court for its decision, a preliminary injunction *pendente lite* was issued under the seal of the Court, enjoining appellant from:

1. Negotiating, transferring or disposing, by endorsement, assignment or otherwise, any of the promissory notes mentioned in said bill of complaint.

2. Instituting or prosecuting any action in any State or United States Court against plaintiff by defendant to enforce the payment of said promissory notes.

The appellee was ordered to file a bond with good and sufficient security in the sum of \$10,000 to pay all costs and damages accruing to defendant by reason of the injunction, if the same be wrongful or without sufficient cause. (P. 22, R.)

Afterwards, said bond was duly filed and approved by said Court. (P. 25, R.)

Thereupon a preliminary injunction was issued following the language of the order therefor. (P. 27, R.)

The foregoing constitutes the material allegations of the bill upon which appellee asks for an injunction and which it now maintains was sufficient to invoke the equitable relief prayed for.

The allegations of the bill were substantially admitted by the affidavit of E. A. Wyld introduced in evidence at the hearing herein by appellant. (P. 17, R.)

The allegations in reference to the "apparent authority" of E. D. Porter to act for the appellee in entering into this contract may be well treated as descriptive of the person who acted for the appellant in executing the contract set forth in the bill of complaint. Whether he acted with or without authority is not material. Neither does the fact that the sale of the stock to appellee was made in good faith and for full value, nor that appellant acquired title to said stock from the prior owner thereof in pursuance of an agreement with appellee that it would do so and thus enable appellant to sell said stock to appellee (as appears by the affidavit of E. A. Wyld made on behalf of appellant), constitute a defense to the action, and in that behalf appellee submits the following points and authorities in support of the injunction *pendente lite* issued herein:

THE AGREEMENT IS VOID.

“The purchase by the corporation of its own shares is illegal and void, as in violation of the provisions of Section 309 of the Civil Code [State of California] prohibiting directors of corporations from . . . reducing the ‘capital stock.’

“The phrase, capital stock, as used in this section, has been construed by the Supreme Court of this State to mean not the shares of which the nominal capital is composed, but the actual capital, i. e., assets with which the corporation carries on its corporate business.”

Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, and cases there cited;

Same case, Ann. Cas. 1914 B, 1013, and 44 L. R. A. N. S. 156.

“This Court will adopt the construction of a State statute given to it by the highest tribunal of that State.”

Foster Federal Practice, Vol. 22, Par. 375.

“A decision of the highest court of a State interpreting a statute of that State is conclusive on the Federal Courts as to the meaning of such statute.”

Spinello v. New York, N. H. & H. R. Co., 183 Fed. 762.

THE PLAINTIFF IS A PROPER PARTY TO BRING THE ACTION.

“As a general rule, a corporation or its stockholders may attack the validity of a corporate contract which is *ultra vires* in the true sense and void.”

Westerlund v. Black Bear Mining Co., 203 Fed. 599;

Holt v. California Development Co., 161 Fed. 3.

EQUITY WILL ALWAYS INTERFERE AND PREVENT BY INJUNCTION THE ALIENATION OF PROPERTY WHERE IT WOULD WORK IRREMEDIAL OR GROSS INJUSTICE.

“Injunctions may be obtained to prevent the alienation of property ‘where it would work irreparable or gross injustice.’ An injunction would, therefore, issue to prevent the transfer of notes whether negotiable or not, whose possession gives their holder a presumptive title to the rights which they evidence, when he threatens or is about to use them in an inequitable manner.”

Foster Federal Practice, Vol. 1, Par. 212.

“A court of equity will interpose by injunction to prevent the transfer of a specific thing, which, if transferred, will be irretrievably lost to the owner, such as negotiable securities and stocks.”

Osborn et al. v. Bank of the United States, 9 Wheaton, page 738.

“In the meantime the note might be negotiated to a claimed bona fide purchaser.”

Monmouth Inv. Co. v. Means, 151 Fed. Rep. 166.

“A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled.”

Ingram v. Smith, 83 Cal. Rep. 238.

THE CONTRACT BEING VOID, IT IS INCAPABLE OF RATIFICATION BY ESTOPPEL OR OTHERWISE.

“An act or contract of a corporation which is beyond the scope of its corporate powers, an act that it cannot lawfully do in any way or manner

under any circumstances, is incapable of ratification by estoppel or otherwise, and the corporation itself may challenge it.”

Westerlund v. Black Bear Mining Co., 203 Fed. Rep. 612.

“A contract made by a corporation which is *ultra vires* in the true sense is void, and neither the corporation nor a stockholder is estopped to attack its validity by the fact that the corporation or the other party has acted under it, nor by delay in bringing suit for its cancellation.”

Holt v. California Development Co., 161 Fed. Rep. 3;

Central Transp. Co. v. Pullman Car Co., 139 U. S. 24;

Converse v. Emerson Talcott & Co., 90 N. E. Rep. 269.

INJUNCTION PROPER TO STAY PROCEEDINGS IN OTHER COURTS.

“The Federal Court having first acquired jurisdiction of the parties and subject-matter of the action, has full authority to restrain the parties from resorting to proceedings in a State Court having concurrent jurisdiction, which would defeat or impair the Federal Court’s jurisdiction.”

Rickey Land Company v. Miller & Lux, 152 Fed. Rep. 11.

“The Federal Court is not prohibited by Rev. St., Sec. 720, from issuing an injunction to restrain the prosecution in a State Court of a threatened suit which has not been actually begun.”

Texas, etc., Co. v. Kuteman, 54 Fed. Rep. 547.

APPELLANT WAS CHARGED WITH NOTICE OF THE VOID ACT OF APPELLEE.

“The powers delegated by the State to corporations are matters of public law, of which no one can plead ignorance. A party dealing with a corporation having limited and delegated powers is chargeable with notice of those powers and their limitations and cannot plead his ignorance of their existence.”

Steele v. Fraternal Tribunes, 106 Am. St. Rep. 160;

Central Transp. Co. v. Pullman Car Co., 139 U. S. 24.

THE GRANTING OF AN INJUNCTION *PEN- DENTE LITE* IS A MATTER OF DISCRETION OF THE COURT BELOW AND WILL NOT BE DIS- TURBED IN THE ABSENCE OF A SHOWING OF AN ABUSE OF THAT DISCRETION.

“Where, however, the sole object for which an injunction is sought, is the protection of property or legitimate business, or the maintenance of the *status quo*, until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, even though there be serious doubt of the ultimate success of the complainant. There is abundant authority in support of these views.”

Wilmington City Ry. Co. v. Taylor, 198 Fed. Rep. 198.

“The granting or withholding of an interlocutory injunction rests in the sound judicial discretion of the Court of original jurisdiction, and, where that Court has not departed from the equitable rules and principles established for its guidance, its orders in this regard may not be reversed by the Appellate

Court without clear proof that it has abused its discretion. An appeal from such an order does not invoke the judicial discretion of the Appellate Court. The question is not whether or not the Appellate Court would have made or would make the order. It is to the discretion of the trial Court, not to that of the Appellate Court, that the law has entrusted the granting or refusing of such an injunction, and the question here is: Does the proof clearly establish an abuse of that discretion by the Court below?"

Fireball Gas Tank & I. Co. v. Commercial Acetylene Co., 198 Fed. Rep. 652.

"But a full trial of the merits is not required on a hearing of an application for a preliminary injunction. Issuance of such a writ is largely within the discretion of the trial Court. On review a reversal is not permissible unless a clear abuse of discretion appears."

City of Kankakee v. American Water Supply Co., 199 Fed. Rep. 760.

"If it appears that the injury to the complainants will be serious, and the injury to the respondents comparatively slight, the injunction will be granted."

Carpenter v. Knollwood Cemetery, 188 Fed. Rep. 857.

The contract remains wholly executory in that the stock was not to be delivered until the notes were paid. The possession and title of the stock as appears by the bill remain with appellant to be delivered to appellee when the notes were fully paid. (P. 6 and 7, R.)

The language quoted from the California decision (*Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464) is not susceptible of the interpretation placed upon it by counsel for appellant, as will appear by the syllabus of that decision, viz.:

“An agreement by a corporation, constituting a condition and a part of the consideration of an entire *contract under which its stock was originally issued*, obligating it, at the election of the stockholder, to repurchase the stock at a stated price, is not within the inhibition of the section. Such an agreement is enforceable against the corporation, subject to the qualification that the rights of creditors are not injuriously affected, and that it would not result in a fraudulent invasion of the rights of other stockholders.”

It certainly cannot be urged as a legal proposition that if the promissory notes were negotiated by appellant and passed into the hands of bona fide purchasers for value, without notice, that appellee would have a valid defense based on the facts appearing in the bill herein.

The order should be affirmed.

Respectfully submitted,

F. A. CUTLER,
Attorney for Appellee.

No. 2712

United States
Circuit Court of Appeals
For the Ninth Circuit.

PAUL OESTING,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the Northern District of California,
First Division.

Filed

FEB 4 - 1916

F. D. Monckton,

~~Clerk~~

United States
Circuit Court of Appeals
For the Ninth Circuit.

PAUL OESTING,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

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Transcript of Record.

Upon Writ of Error to the United States District
Court of the Northern District of California,
First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

JOHN T. WILLIAMS and HERBERT CHOYNSKI,

Attorneys for Defendant, San Francisco, Calif.

UNITED STATES OF AMERICA,
District Court of the United States, Northern District of California.

Clerk's Office.

No. 5696.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
PAUL OESTING,
Defendant.

Praeceptum [for Transcript of Record].

To the Clerk of said Court:

Sir: Please issue

1. The indictment.
2. The plea.
3. The judgment.
4. The petition for writ of error, and specifications of error.
5. The order allowing writ of error.
6. The bond on appeal.
7. Minutes of June 21st, 1915.
8. Assignment of errors.
9. Original writ of error.
10. Original citation on writ of error.
11. This praecipe.

HERBERT CHOYNSKI,
Attorney for Defendant and Plaintiff in Error.

[Endorsed]: Filed Dec. 7, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

[Indictment.]

In the District Court of the United States, in and for the Northern District of California, First Division.

Violation Sec. 215, C. C. U. S.

At a stated term of said court begun and holden at the city and county of San Francisco, within and for the State and Northern District of California, on the first Monday of March in the year of our Lord one thousand nine hundred and fifteen,

The Grand Jurors of the United States of America, within and for the State and District aforesaid, on their oaths present: THAT

DR. PAUL OESTING, *alias* PAUL ALLEN, doing business at No. 986 Market Street in the city and county of San Francisco, in the State and Northern District of California under the name of Dr. Jordan, L. J. Jordan, Incorporated, and Jordan's Museum of Anatomy, a coporation organized and existing under and by virtue of the laws of the State of California, late of the said State and District, heretofore, to wit, on or about the 15th day of May, in the year of our Lord one thousand nine hundred and twelve, in the city and county of San Francisco, State and Northern District of California, within the jurisdiction of this court, and under the guise

*Page-number appearing at foot of page of original certified Record.

and name of the said Jordan's Museum of Anatomy, devised a certain scheme or artifice to defraud, or for obtaining money or property by means of certain false pretenses, representations or promises to be effected by means of the postoffice establishment of the United States, which said scheme or artifice is in substance and effect as follows:

That he, the said Dr. Paul Oesting, *alias* Paul [2] Allen, should place or cause to be placed, advertisements in certain newspapers of general circulation published within the United States, or in letters, booklets or other prints, wherein it should be set forth in substance or effect that the said Dr. Jordan was a physician practicing in the city and county of San Francisco, State of California, and specially qualified to treat private diseases of men, that is to say, among other diseases, syphilis, (blood poison), gonorrhoea, and diseases and affections arising therefrom, lost vitality, bladder, kidney, prostatic and urinary diseases, and had cured numerous persons afflicted with said diseases, and by means of said advertisements, letters, booklets or other prints, he, the said Dr. Paul Oesting, *alias* Paul Allen, then and there intended to cause or induce John Bammer, J. P. Millspaugh, George R. Alberts, Anson Ashford, and John Caroway, and divers other persons whose names are to the Grand Jurors aforesaid, unknown, and the public generally, to communicate and open correspondence with Dr. Jordan, by means of the postoffice establishment of the United States, relative to their real or supposed ailments; that when

said persons should communicate with him, the said Dr. Jordan, whom he, the said Dr. Paul Oesting, *alias* Paul Allen, then and there well knew was not a doctor or person existing in life or in fact during all of the times set forth in this indictment, by the means aforesaid, that the said Dr. Jordan should write or communicate with said persons by means of letters placed in the said postoffice establishment of the United States, and in substance and effect should state to each of such persons, with intent to defraud each and all of said [3] persons, irrespective of the symptoms theretofore communicated as aforesaid to him, and even in cases where the symptoms indicated health rather than disease, and without any proper knowledge of the real condition of said persons, that they, the said persons, were afflicted with diseases which he, the said Dr. Jordan, could cure, and that he would furnish treatments for the cure of such alleged diseases upon the payment to him of certain sums of money; and that by means of said letters so placed as aforesaid, by the said Dr. Paul Oesting, *alias* Paul Allen, he then and there intended to cause or induce all of said persons so communicating with the said Dr. Jordan as aforesaid, to deliver or send to the address of Dr. Jordan, large sums of money for the purpose of procuring from him (as said persons had been led to believe), medicine or treatments skilfully or properly designed or prepared for the cure or alleviation of the diseases with which said persons were afflicted, or had been so induced by said Dr. Paul Oesting, *alias* Paul Allen, to believe them-

selves to be afflicted, which said sums of money, so sent or delivered to the said Dr. Jordan as aforesaid, he, the said Dr. Paul Oesting, *alias* Paul Allen, should fraudulently convert or appropriate to his own use, and in return therefor, should send or deliver to each of said persons so sending or delivering to him sums of money, certain medicine or treatment not skilfully or properly designed, prepared, and of little or no value, for the cure of the aforesaid persons, Dr. Paul Oesting, *alias* Paul Allen, then and there having no proper or professional knowledge of such persons' conditions, or whether such persons were diseased or not, or whether or not said purported medicine or treatment was [4] capable of benefitting said persons, as he, the said Dr. Paul Oesting, *alias* Paul Allen, then and there well knew.

And he, the said Dr. Paul Oesting, *alias* Paul Allen, on the second day of July, in the year of our Lord one thousand, nine hundred and twelve, at the city and county of San Francisco, in the State and Northern District of California for the purpose of executing said scheme and artifice, or in attempting so to do, unlawfully, feloniously, knowingly and wilfully, did place or cause to be placed in the postoffice establishment of the United States at San Francisco, in the State and District aforesaid, or in a station, street-box or letter-box thereof, an authorized depository for mail matter, to be sent or delivered by the postoffice establishment of the United States, a certain letter upon which the postage had been fully prepaid, and addressed to John Bammer, Colusa, Calif., a copy of which said letter is as follows, to wit:

"Office of Dr. L. J.
Jordan, 986 Market
St., Opposite Sixth,
Hours: 9 A. M. to
5 P. M., and 7 to 9
P. M., Sundays, 10
to 12 A. M.

Private Address:
Paul Allen,
986 Market Street.

Jordan's Museum of
Anatomy.
Established 50 years.
Diseases of Men.

San Francisco, Cal. July 2, 1912.

Mr. John Bammer,
Box 800, Colusa, Cal.

Dear Sir and Friend:

I have your return of the question blank and test papers. You should have written me by letter also—giving me any further information you deem necessary that I should know. From the data you sent me it is my judgment that you have an excess of amorphous urates and phosphates, indicating wasted energy, and anemia neuresthenia, at the expense of some of the functions of the body. You require and demand treatment to place you on a par with your fellow men. You will find the testicles are weak and flabby and not manufacturing healthy spermatozoa. There is no evidence of Bright's disease, or proof of Diabetes, altho an overworked kidney may lead to both. You will find mucous strings flocculi or sediment [5] in the urine, indicating prostatic inflammation at the neck of the bladder, with the consequent loss of vitality and absence of complete sexual satisfaction required by all male animals of health.

Your case is a complicated one requiring careful and scientific treatment on the part of any physician who treats you. If you give your case into my hands I must have honest co-operation on your part, fol-

lowing to the letter my instructions, which are perfectly simple.

I don't profess to say that your case is an easy one to handle. But you can secure very material assistance. My treatment will create new blood, new muscle and new secretions, promote circulation, build up and maintain new nerve cells and fibres. The old tissues will be removed and new substituted in it's place. The weakened and run-down system will be built up and invigorated, and injected with spirit and life—such as should be found in every man who cares to give the proper attention to his health and the maintenance of his vigor and manhood power.

I will take your case and furnish the medicine required for \$10.00 a month. This is fair method of payment to you, although I do not know your financial circumstances. You need not hesitate to write me fully as everything is kept confidential. All medicines are sent out in plain packages, and no one knows from whom they come.

I would like your reply by return mail whether you wish to take up the treatment or not. By writing me your intentions, I will know what to *do* do about further correspondence. I do not like to write unnecessary letters to anyone, as they might go astray, or fall into *some elses* hands and cause you embarrassment; therefore, reply at once.

If you could come down and see me—I would be glad to have you do so. Please let me know if you can come, and at what time. I would like to talk with you, as things can be explained better by a per-

sonal interview than in a letter.

With kind regards, and best wishes, and awaiting your early reply, I remain,

Very sincerely yours,

Dict. X.

Dr. L. J. JORDAN."

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

SECOND COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: THAT

DR. PAUL OESTING, *alias* PAUL ALLEN, doing business at No. 986 Market Street in the city and county of San Francisco, in the State and Northern District [6] of California, under the name of Dr. Jordan, L. J. Jordan, Incorporated, and Jordan's Museum of Anatomy, a corporation organized and existing under and by virtue of the laws of the State of California, late of the said State and District, heretofore, to wit, on or about the 15th day of May, in the year of our Lord, one thousand, nine hundred and twelve, in the city and county of San Francisco, in the State and District aforesaid, and within the jurisdiction of this court, and under the guise and name of the said Jordan's Museum of Anatomy, had devised a certain scheme or artifice to defraud, or for obtaining money and property by means of certain false pretenses, representations or promises, to be effected by means of the postoffice establishment of the United States, which said scheme or artifice

has been fully and at length set forth in the first count of this indictment, and which is now hereby particularly referred to and incorporated herein and made a particular part of this count of this indictment.

And having devised said scheme or artifice, and for the purpose of executing the same and in attempting so to do, they, the said Dr. Paul Oesting, *alias* Paul Allen, on the twenty-fifth day of February, in the year of our Lord one thousand, nine hundred and thirteen, at the city and county of San Francisco, in the State and Northern District of California and within the jurisdiction of this court, did wilfully, unlawfully, knowingly and feloniously place and cause to be placed in the postoffice establishment of the United States at San Francisco, in the State and Northern District of California, or in a station, street-box or letter-box thereof, an authorized depository for mail matter to be sent or delivered by the postoffice establishment [7] of the United States, a certain envelope upon which postage had been fully prepaid, and addressed to J. P. Millspaugh, Cherry Creek, Nevada, and which envelope contained a certain letter in words and figures as follows, to wit:

"Office of Dr. L. J.
Jordan, 986 Market
St., Opposite Sixth,
Hours: 9 A. M. to
5 P. M., and 7 to 9
P. M., Sundays, 10
to 12 A. M.

Private Address:
Paul Allen,
986 Market Street.

Jordan's Museum of
Anatomy.
Established 50 years.
Diseases of Men.

San Francisco, Cal. Feb. 25, 1913.

Mr. J. P. Millspaugh,
Cherry Creek, Nevada.

Dear sir:

This is in reply to yours of recent date. The chemical test papers and question blank were carefully and scientifically considered. From this data it is my judgment that you have an excess of amorphous urates and phosphates, indicating wasted energy, anemia neuresthenia at the expense of some of the functions of the body. You require and demand treatment to place you on par with your fellow men.

You will find the testicles are weak and flabby and are not manufacturing healthy spermatozoa. There is no evidence of Bright's disease or proof of Diabetes, although an overworked kidney may lead to both. You will find mucous strings flocculi or sediment in the urine indicating prostatic inflammation at the neck of the bladder, with the consequent loss of vitality and absence of complete sexual satisfaction absolutely required by all male animals of health.

Your case is a complicated one requiring careful and scientific treatment on the part of any physician who takes upon himself the responsibility of treating you. If you give your case into my hands I must have honest co-operation on your part, following to

the letter my instructions. I will take your case and furnish all medicines required in the course of treatment for \$47.50 cash, or, if you wish to pay on time, \$17.50 down and \$10.00 monthly ; time required, about three or four months. If you accept either of these propositions, which are very liberal, kindly remit the amount with which to start in, and continue to do so until cured. Sexual neuresthenia results from the violation of the laws of health so impairing the system that it ceases to perform its functions.

The victim is awakened by dreams, the result of this disturbance ; this is continued, usually occurring at shorter intervals often accompanied by erotic dreams, until the organ becomes incapable of performing its functions, producing a long line of reflex irritations and complications.

You cannot afford to lose your stamina or to be a failure in life. Low spirits never bother the healthy, No one can be happy or successful unless well. There is latent power in everyone—all it wants is to be awakened and cared for. [8]

Expecting an early reply, I am,

Yours very truly,

Dict. by F. L.

Dr. L. J. JORDAN."

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

THIRD COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: THAT

DR. PAUL OESTING, *alias* PAUL ALLEN, doing business at No. 986 Market Street, in the city and county of San Francisco, in the State and Northern District of California, under the name of Dr. Jordan, L. J. Jordan, Incorporated, and Jurodan's Museum of Anatomy, a corporation organized and existing under and by virtue of the laws of the State of California, late of the said State and District, heretofore, to wit, on or about the fifteenth day of May, in the year of our Lord one thousand, nine hundred and twelve, in the city and county of San Francisco, State and Northern District of California, within the jurisdiction of this Court, and under the guise and name of the said Jordan's Museum of Anatomy, devised a certain scheme or artifice to defraud, or obtaining money or property by means of certain false pretenses, representations or promises to be effected by means of the postoffice of the United States, which said scheme or artifice is in substance and effect as follows:

That he, the said Dr. Paul Oesting, *alias* Paul Allen, should place or cause to be placed, advertisements in certain newspapers of general circulation published [9] within the United States, or in letters, booklets or other prints, wherein it should be set forth in substance or effect that the said Dr. Jordan was a physician practicing in the city and county of San Francisco, State of California, and specially qualified to treat private diseases of men, that is to say, among other diseases, syphilis (blood poison), gonorrhoea, and diseases and affections arising therefrom, lost vitality, bladder, kidney,

prostatic and urinary diseases, and had cured numerous persons afflicted with said diseases, and by means of said advertisements, letters, booklets or other prints, he, the said Dr. Paul Oesting, *alias* Paul Allen, then and there intended to cause or induce John Bammer, J. P. Millspaugh, George R. Alberts, Anson Ashford, and John Caroway, and divers other persons whose names are to the Grand Jurors aforesaid, unknown, and the public generally, to communicate and open correspondence with Dr. Jordan, by means of the postoffice establishment of the United States, relative to their real or supposed ailments; that when said persons should communicate with him, the said Dr. Jordan, whom he, the said Dr. Paul Oesting, *alias* Paul Allen, then and there well knew was not a doctor or person existing in life or in fact during all the times set forth in this indictment, by the means aforesaid, that the said Dr. Jordan should write or communicate with said persons by means of letters placed in the said postoffice establishment of the United States, and in substance and effect should state to each of such persons, with intent to defraud each and all of said persons, irrespective of the symptoms theretofore communicated as aforesaid to him, and even in cases where the symptoms indicated health rather than disease, and without [10] any proper knowledge of the real condition of said persons, that they, the said persons, were afflicted with diseases which he, the said Dr. Jordan, could cure, and that he would furnish treatments for the cure of such alleged diseases upon the payment to him of certain sums of money; and that by

means of said letters so placed as aforesaid, by the said Dr. Paul Oesting, *alias* Paul Allen, he then and there intended to cause or induce all of said persons so communicating with the said Dr. Jordan as aforesaid, to deliver or send to the address of Dr. Jordan, large sums of money for the purpose of procuring from him (as said persons had been led to believe), medicine or treatments skilfully or properly designed or prepared for the cure or alleviation of the diseases with which said persons were afflicted, or had been so induced by said Dr. Paul Oesting, *alias* Paul Allen, to believe themselves to be afflicted, which said sums of money, so sent or delivered to the said Dr. Jordan as aforesaid, he, the said Dr. Paul Oesting, *alias* Paul Allen, should fraudulently convert or appropriate to his own use, and in return therefor, should send or deliver to each of said persons so sending or delivering to him sums of money, certain medicine or treatment not skilfully or properly designed or prepared, and of little or no value, for the cure of the aforesaid persons, Dr. Paul Oesting, *alias* Paul Allen, then and there having no proper or professional knowledge of such persons' conditions, or whether such persons were diseased or not, or whether or not such purported medicine or treatment was capable of benefitting said persons, as he, the said Dr. Paul Oesting, *alias* Paul Allen, then and there well knew. [11]

And he, the said Dr. Paul Oesting, *alias* Paul Allen, on the fifteen the day of July, in the year of our Lord one thousand nine hundred and twelve, at

the city and county of San Francisco, in the State and Northern District of California, for the purpose of executing said scheme and artifice, or in attempting so to do, unlawfully, feloniously, knowingly and wilfully did place or cause to be placed in the post-office establishment of the United States at San Francisco, in the State and District aforesaid, or in a station, street-box or letter-box thereof, an authorized depository for mail matter, to be sent or delivered by the postoffice establishment of the United States, a certain letter upon which the postage had been fully prepaid, and addressed to Mr. Geo. R. Alberts, Box 1648, Tombstone, Arizona, a copy of said letter being as follows, to wit:

"Office of Dr. L. J. Jordan, 986 Market St., Opposite Sixth, Hours: 9 A. M. to 5 P. M., and 7 to 9 P. M., Sundays, 10 to 12 A. M.	Private Address: Paul Allen, 986 Market Street.	Jordan's Museum of Anatomy. Established 50 years. Diseases of Men.
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San Francisco, Cal., July 15, 1912.

Mr. Geo. R. Alberts,
Box 1648,
Tombstone, Arizona.

My Dear Sir:—

I had expected to hear from you ere this. I have written several letters, and I think I am entitled to at least the courtesy of a reply—on account of the interest I have taken in your case. Of course, if you do not wish to treat with me, it is immaterial, but a young man in your condition, and thinking of marrying while you are physically and sexually

weak, is exhibiting a very pronounced lack of common sense, and dishonest with himself and those who will be dependent upon him in future years. You may be able to stave off matters for a time but the day will come when you will regret your carelessness. I say this candidly to you. I believe in talking plainly to men. It does no good to conceal from a man the things he should know. You have told me that you considered marriage. Would you attempt such a thing in your present weakened condition, and while you are sustaining a loss that each and every day is leaving you more unfit to attend to your family duties. Can you let this waste go on until your sexual organs have wasted and decreased to such an extent that you are unable [12] to provide your faithful and expectant wife with the happiness she naturally expects and must have to make the home circle happy, contented and peaceful. Can you afford to let your condition become such that it will cause you shame, and your wife disgrace and humiliation. No, deep down in your intuitive understanding you know that you cannot. Then why not remedy these matters, as can be done if you take the proper and immediate steps. I can bring about a restoration providing you come to me now, and follow out my instructions and advice.

It may be possible that my former letters did not reach you. If they did, it seems to me that you would reply ere this. However, they may have been held up in the postoffice, and providing I don't hear from you in reply to this within a reasonable time, I will write the postmaster to kindly see that you

get these letters, and explain to him that this is necessary on account of the condition that you are in, as I want to see you right before you get married. I deem it my duty as a physician to advise you not to neglect your case. I have always taken a strong interest in young men—and want them to be in proper physical and sexual condition before they take such steps as may prove embarrassing later.

I made you a very liberal fee, considering my reputation and ability as a physician in the medical and scientific world, of \$50.00 cash in advance for your case. In order to make it easy for you, as I want to help you in every way possible, I stated that if you could not send the whole amount at once, to send me \$20.00 by return mail and I would send you the first months medicines—then you can pay me \$10.00 a month thereafter. Isn't this fair. By taking the installment plan of paying, you can readily discontinue treatment after the first month or so providing you were not being benefitted. Of course, I do not wish to cause the impression that yours is an easy case. It will take a few months to put you in such condition as you should be in. Let me hear from you at once so I will know what to do with my records in your case. I must have some date before I can file same, and don't wish to annoy you with unnecessary correspondence. I thank you for your courtesy.

Yours sincerely,

Dr. L. J. JORDAN."

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

FOURTH COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: THAT [13]

DR. PAUL OESTING, *alias* Paul Allen

doing business at No. 986 Market Street, in the city and county of San Francisco, in the State and Northern District of California, under the name of Dr. Jordan, L. J. Jordan, Incorporated, and Jordan's Museum of Anatomy, a corporation organized and existing under and by virtue of the laws of the State of California, late of the said State and District, heretofore, to wit, on or about the fifteenth day of May, in the year of our Lord one thousand nine hundred and twelve in the city and county of San Francisco, State and Northern District of California, within the jurisdiction of this court, and under the guise and name of the said Jordan's Museum of Anatomy, devised a certain scheme or artifice to defraud, or for obtaining money or property by means of certain false pretenses, representations or promises to be effected by means of the postoffice establishment of the United States, which said scheme or artifice is in substance and effect as follows:

That he, the said Dr. Paul Oesting, *alias* Paul Allen, should place or cause to be placed, advertisements in certain newspapers of general circulation published within the United States, or in letters, booklets or other prints, wherein it should be set

forth in substance or effect that the said Dr. Jordan was a physician practicing in the city and county of San Francisco, State of California, and specially qualified to treat private diseases of men, that is to say, among other diseases, syphilis (blood poison), gonorrhoea, and diseases and affections arising therefrom, lost vitality, bladder, kidney, prostatic and urinary diseases, and had cured numerous persons afflicted [14] with said diseases, and by means of said advertisements, letters, booklets, or other prints, he, the said Dr. Paul Oesting, *alias* Paul Allen, then and there intended to cause or induce John Bammer, J. P. Millspaugh, George R. Alberts, Anson Ashford, and John Caroway, and divers other persons whose names are to the Grand Jurors aforesaid, unknown, and the public generally, to communicate and open correspondence with Dr. Jordan, by means of the postoffice establishment of the United States relative to their real or supposed ailments; that when said persons should communicate with him, the said Dr. Jordan, whom he, the said Dr. Paul Oesting, *alias* Paul Allen, then and there well knew was not a doctor or person existing in life or in fact during all the times set forth in this indictment, by the means aforesaid, that the said Dr. Jordan should write or communicate with said persons by means of letters placed in the said post-office establishment of the United States, and in substance and effect should state to each of such persons, with intent to defraud each and all of said persons, irrespective of the symptoms theretofore communicated as aforesaid to him, and even in cases

where the symptoms indicated health rather than disease, and without any proper knowledge of the real condition of said persons, that they, the said persons, were afflicted with diseases which he, the said Dr. Jordan, could cure, and that he would furnish treatments for the cure of such alleged diseases upon the payment to him of certain sums of money; and that by means of said letters so placed as aforesaid, by the said Dr. Paul Oesting, *alias* Paul Allen, he then and there intended to cause or induce all of said persons so communicating with the said Dr. Jordan as aforesaid, [15] to deliver or send to the address of Dr. Jordan, large sums of money for the purpose of procuring from him (as said persons had been led to believe), medicine or treatments skilfully or properly designed or prepared for the cure or alleviation of the diseases with which the said persons were afflicted, or had been so induced by said Dr. Paul Oesting, *alias* Paul Allen, to believe themselves to be afflicted, which said sums of money, so sent or delivered to the said Dr. Jordan as aforesaid, he, the said Dr. Paul Oesting, *alias* Paul Allen, should fraudulently convert or appropriate to his own use, and in return therefor, should send or deliver to each of said persons so sending or delivering to him sums of money, certain medicine or treatment not skilfully or properly designed or prepared and of little or no value, for the cure of the aforesaid persons, Dr. Paul Oesting, *alias* Paul Allen, then and there having on proper or professional knowledge of such persons' conditions, or whether such persons were diseased or not, or whether or

not such purported medicine or treatment was capable of benefiting persons, as he, the said Dr. Paul Oesting, *alias* Paul Allen, then and there well knew.

And he, the said Dr. Paul Oesting, *alias* Paul Allen, on the seventh day of November 1912, at the city and county of San Francisco, in the State and Northern District of California, for the purpose of executing said scheme or artifice, or in attempting so to do, unlawfully, feloniously, knowingly and wilfully, did place or cause to be placed in the post-office establishment of the United States, at San Francisco, in the State and District aforesaid, or in a station, street-box or letter-box thereof, [16] an authorized depository for mail matter, to be sent or delivered by the postoffice establishment of the United States, a certain letter upon which the postage had been fully prepaid, and addressed to Mr. Anson Ashford, Buckley, Wash., a copy of said letter being as follows, to wit:

"Office of Dr. L. J.	Private Address:	Jordan's Museum of
Jordan, 986 Market	Paul Allen,	Anatomy.
St., Opposite Sixth,	986 Market Street.	Established 50 years.
Hours: 9 A. M. to		Diseases of Men.
5 P. M., and 7 to 9		
P. M., Sundays, 10		
to 12 A. M.		

San Francisco, Cal., Nov. 7, 1912

Mr. Anson Ashford,
Buckley, Wash.

Dear Sir and Friend:—

I thank you for your remittance of \$2.50 which I

credited to your account. I also received the sample of urine, and the question blank, and other data. Same was carefully considered and the urine analyzed, and I find your condition is quite serious. The urine shows large percentages of sugar, showing a serious condition known as Diabetes. Immediate treatment is necessary, and my suggestion would be that you take up treatment at once. This is affecting the kidneys and no doubt causes the pains you mention. Do you ever feel a numb feeling at the ends of your fingers, or toes, ears, nose, etc? Your condition is very weak, as is shown by emissions at night and it is my opinion that your case is quite complicated. The losses at night have a tendency to weaken you, and derange the nervous and sexual systems. It causes loss of appetite, little desire for work; lack of memory; embarrassment; pains in sexual organs; weak eyes; lack of confidence and strength. The cells, muscles and tissues become wasted through an insufficient supply of blood or blood that is very much decreased in nourishing power. Your system needs a strong tonic and restorative, not merely a stimulant. Something that will build new blood, new bone, new muscle and new tissue, and throw off the decayed and waste substances, engorging the parts with a supply of fresh pure blood, and building the entire system up to normal.

Whether you treat with me or not—I advise you to seek at once the services of a competent and reputable physician; one that you know is above the average. If you do treat with me, I can promise

you results if you give me your co-operation and follow out my instructions and advice. I want no man's case unless he is honest and sincere and wants to be benefited. I am a very busy man and have no time to dissipate with triflers. From the fact that you sent me \$2.50 for a report, I think you are sincere and that you would make a desirable patient. I have spent the greater part of a life time treating, studying and curing the diseases of men, and have won a reputation that is second to none by my fair methods to all.

I am willing to take your case on that condition—namely that you will obey my instructions and take my [17] treatment faithfully. I will give you credit for the \$2.50 you paid me, and send you the first months medicines for \$22.50. Then I will reduce your fee after the first month to \$15.00 a month. I make this offer of monthly payments as it may be more convenient for you to pay in this manner. A few months will put you in good condition, and if you start now, you will notice very good results in a short time—but my dear young man, whatever you do, don't let this condition run along. If you want help, I can give it to you and would like to have your case at once. May I expect you on my list by return mail? You have youth and perhaps a good constitution, and your rapid and complete recovery should be gained without the possibility of failure.

Hoping to have your remittance by return mail, I am,

Yours sincerely,

Dr. L. J. JORDAN."

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

FIFTH COUNT.

And the Grand Jurors aforesaid, do further present: THAT

DR. PAUL OESTING, *alias* PAUL ALLEN, doing business at No. 986 Market Street, in the city and county of San Francisco, in the State and Northern District of California, under the name of Dr. Jordan, L. J. Jordan Incorporated, and Jordan's Museum of Anatomy, a corporation organized and existing under and by virtue of the laws of the State of California, late of the said State and District, heretofore, to wit, on or about the fifteenth day of May, in the year of our Lord one thousand nine hundred and twelve, in the city and county of San Francisco, State and Northern District of California, within the jurisdiction of this Court, and under the guise and name of the said Jordan's Museum of Anatomy, devised a certain scheme or artifice to [18] defraud or for obtaining money or property by means of certain false pretenses, representations or promises to be effected by means of the post office establishment of the United States, which said scheme or artifice is in substance and effect as follows:

That he, the said Dr. Paul Oesting, *alias* Paul Allen, should place or cause to be placed, advertisements in certain newspapers of general circulation published within the United States, or in

letters, booklets, or other prints, wherein it should be set forth in substance or effect that the said Dr. Jourdan was a physician practicing in the city and county of San Francisco, State of California, and specially qualified to treat private diseases of men, that is to say, among other diseases, syphilis, (blood poison), gonorrhoea, and diseases and affections arising therefrom, lost vitality, bladder, kidney prostatic and urinary diseases, and had cured numerous persons afflicted with said diseases, and by means of said advertisements, letters, booklets or other prints, he, the said Dr. Paul Oesting, *alias* Paul Allen, then and there intended to cause or induce John Bammer, J. P. Millspaugh, George R. Alberts, Anson Ashford, and John Caroway, and divers other persons whose names are to the Grand Jurors aforesaid, unknown, and the public generally, to communicate and open correspondence with Dr. Jordan, by means of the postoffice establishment of the United States relative to their real or supposed ailments; that when said persons should communicate with him, the said Dr. Jordan, whom he, the said Dr. Paul Oesting, *alias* Paul Allen, then and there well knew was not a doctor or person existing in life or in fact during all the times set forth in this indictment, [19] by the means aforesaid that the said Dr. Jordan should write or communicate with said persons by means of letters placed in the said postoffice establishment of the United States, and in substance and effect should state to each of such persons, with intent to defraud each and all of said persons, irrespective of the symptoms

theretofore communicated as aforesaid to him, and even in cases where the symptoms indicated health rather than disease, and without any proper knowledge of the real condition of said persons, that they, the said persons were afflicted with diseases which he, the said Dr. Jordan, could cure, and that he would furnish treatments for the cure of such alleged diseases upon the payment to him of certain sums of money; and that by means of said letters so placed as aforesaid, by the said Dr. Paul Oesting, *alias* Paul Allen, he then and there intended to cause or induce all of said persons so communicating with the said Dr. Jordan as aforesaid, to deliver or send to the address of Dr. Jordan, large sums of money for the purpose of procuring from him (as said persons had been led to believe), medicine or treatments skilfully or properly designed or prepared for the cure or alleviation of the diseases with which said persons were afflicted, or had been so induced by said Dr. Paul Oesting, *alias* Paul Allen, to believe themselves to be afflicted, which said sums of money, so sent or delivered to the said Dr. Jordan as aforesaid, he, the said Dr. Paul Oesting, *alias* Paul Allen, should fraudulently convert or appropriate to his own use, and in return therefor, should send or deliver to each of said persons so sending or delivering to him sums of money, certain medicine or treatment not skilfully or properly designed or prepared, [20] and of little or no value for the cure of the aforesaid persons, Dr. Paul Oesting, *alias* Paul Allen, then and there

having no proper or professional knowledge of such persons' conditions, or whether such persons were diseased or not, or whether or not such purported medicine or treatment was capable of benefiting said persons, as he, the said Dr. Paul Oesting, *alias* Paul Allen, then and there well knew.

And he, the said Dr. Paul Oesting, *alias* Paul Allen, on the twenty-first day of September, in the year of our Lord one thousand nine hundred and twelve, at the city and county of San Francisco, in the State and Northern District of California, for the purpose of executing said scheme and artifice, or in attempting so to do, unlawfully, feloniously, knowingly and wilfully, did place or cause to be placed in the postoffice establishment of the United States at San Francisco, in the State and District aforesaid, or in a station, street-box or letter-box thereof an authorized depository for mail matter, to be sent or delivered by the postoffice establishment of the United States, a certain letter upon which the postage had been fully prepaid, and addressed to Mr. John Caroway, Oroville, Calif., a copy of which said letter being as follows, to wit:

"Office of Dr. L. J.	Private Address:	Jordan's Museum of
Jordan, 986 Market	Paul Allen,	Anatomy.
St., Opposite Sixth,	986 Market Street.	Established 50 years.
Hours: 9 A. M. to		Diseases of Men.
5 P. M., and 7 to 9		
P. M., Sundays, 10		
to 12 A. M.		

San Francisco, Cal., Sept. 21, 1912

Mr. John Caroway,
Oroville, Calif.

Dear Sir:—

If a man came along and offered you \$2.50, or the

opportunity to make this amount, would you refuse the [21] offer? If you are a young man working for a daily, or weekly, or monthly wage—wouldn't an offer of this kind appeal to you. I have offered you the opportunity several times to do this—to make a clean saving of \$2.50, but you have failed thus far to accept. It would be an investment of \$2.50 towards health insurance, by far the greatest insurance in the world—for good health is the most valuable asset of mankind. Charity begins at home. Be charitable to yourself. One can go on for a time fooling themselves, but you cannot fool nature. Our Creator, through his natural gifts, intended that each and every one of us should be healthy, which means happiness, freedom from worry, content and *dolce far niente*.

It is only through sickness, abuse, excess, or accident that we become weakened; that some of the organs refuse to perform their functions satisfactorily. The organs become weak and cannot retain the vital fluid that sustains and buoys up the system. Once this loss commences, a warning is given that something is radically wrong. The vital drain saps the virility, energy and physical vigor of the entire body—causing a feeling of ennui, drowsiness, lack of energy, sleepiness, in fact feelings that are indescribable.

Can you not spare 5 minutes of your busy time to write me when you intend taking up treatment? I know you are perhaps very busy—but if you have the time to read my letters, you can at least spare time to answer this one—either one way or

the other. Remember, I don't want your case after your system has become so weakened and broken down that no doctor, or no treatment can restore you. Send me \$12.50, a saving of \$5.00 and I will send you the first month's medicines at once.

Very sincerely,

Dr. L. J. JORDAN."

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

JOHN W. PRESTON,

United States Attorney.

Names of Witnesses Appearing Before the Grand Jury:

JAMES O'CONNELL.

E. HONVERY.

[Endorsed]: A true Bill W. N. Concanon, Foreman Grand Jury. Presented in open court and filed May 4, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [22]

**[Minutes, May 26, 1915—Order Directing Entry of
Plea of "Not Guilty."]**

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 26th day of May, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable M. T. DOOLING, District Judge.

No. 5696.

UNITED STATES OF AMERICA

vs.

PAUL OESTING.

This case came on regularly this day for the entry of the plea of defendant to the indictment herein against him. Defendant was present in court with his attorney, Mr. Williams, and then and there plead Not Guilty to the indictment herein, which plea the Court ordered, and the same is hereby, entered. Thereupon, on motion of W. E. Hettman, Esq., Assistant United States Attorney, the Court ordered that said case be, and the same is hereby, continued until June 26th, 1915, to be set for trial of said defendant. [23]

**[Minutes, June 21, 1915—Order Directing Entry of
Plea of "Guilty," etc.]**

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the court-room thereof, in the city and county of San Francisco, on Monday, the 21st day of June, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable M. T. DOOLING, District Judge.

No. 5696.

UNITED STATES OF AMERICA

vs.

PAUL OESTING.

This case came on regularly this day to be set for the trial of defendant upon the indictment herein against him. John W. Preston, Esq., appeared as United States Attorney. Defendant was present with his attorney, John T. Williams, Esq. After hearing Mr. Preston, defendant requested permission to withdraw his plea of Not Guilty heretofore entered herein, which request the Court granted and defendant then and there withdrew his said plea and then and there entered a plea of Guilty to said indictment, which plea the Court ordered, and the same is hereby, entered. Mr. Williams then made a statement to the Court and called Dr. Douglas Montgomery, F. C. Talbot, C. M. Belshaw, C. W. Smith and Paul Oesting (defendant), each of whom were duly sworn and examined on behalf of defendant.

Thereupon, after hearing Mr. Preston, defendant was called to the bar for judgment and asked if he had any legal cause to show why such judgment should not be pronounced herein against him and no sufficient cause being shown or appearing to the Court, it is ordered that said defendant Paul Oesting, for the offense of which he stands convicted herein, be imprisoned for the period of one year in the county jail of [24] Alameda County, State of California, and that he pay a fine in the sum of Five Hundred (\$500) Dollars and in the default of the payment thereof he be further imprisoned until said fine is paid or he be otherwise discharged by due process of law. Further ordered that defendant be committed to the custody of the United States Marshal for this District to execute said judgment of Imprisonment and that commitment issue accordingly. On motion of Mr. Williams, further ordered that the execution of said judgment be, and the same is hereby, stayed for a period of five (5) days from the date hereof. [25]

*In the District Court of the United States, Northern
District of California, First Division.*

No. 5696.

Convicted of Using U. S. Mails for Scheme to
Defraud.

UNITED STATES OF AMERICA

vs.

PAUL OESTING.

Judgment on Plea of Guilty.

John W. Preston, Esq., United States Attorney, and the defendant with his counsel came into court. The defendant was duly informed by the Court of the nature of the indictment filed against him on the 4th day of May, 1915, and of his arraignment and plea of guilty.

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment:

THAT WHEREAS the said defendant having been duly convicted in this court as aforesaid:

IT IS THEREFORE ORDERED and ADJUDGED that the said Paul Oesting be imprisoned in the Alameda County Jail, Alameda Co., California, for the period of one year, and that he pay a fine in the sum of \$500, and in default of the payment of said fine that said Paul Oesting be further imprisoned until said fine be paid.

Entered this 21st day of June, 1915.

W. B. MALING,

Clerk,

By C. W. Calbreath,

Deputy Clerk. [26]

*In the United States District Court, in and for the
Northern District of California.*

Number —.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PAUL OESTING,

Defendant.

Petition for Writ of Error and Order Allowing Writ.

Your petitioner, Paul Oesting, the defendant above named, brings this, his petition for a writ of error, to the District Court of the United States, in and for the Northern District of California, and respectfully represents:

That heretofore, by final judgment of the District Court of the United States, in and for the Northern District of California, rendered and entered in a criminal action therein pending and in which the United States of America is plaintiff and your petitioner defendant, it was adjudged that your petitioner was guilty of the offense of using the post-office establishment of the United States to defraud certain and sundry persons, as charged in the indictment theretofore returned by the United States Grand Jury, and as a punishment therefor your petitioner was sentenced to serve one year of imprisonment in the county jail of the county of Alameda, State of California, and to pay a fine of five hundred dollars.

That your petitioner claims a writ of error against said judgment from the United States Circuit Court

of Appeals, for the Ninth Circuit, and in that behalf avers that there is manifest error in said indictment upon which said judgment was based, and in said judgment, as set out in the assignment of errors filed herewith. [27]

WHEREFORE, your petitioner prays that he be allowed herein a writ of error upon said judgment rendered against him from the United States Circuit Court of Appeals for the Ninth Circuit to the said District Court of the United States, in and for the Northern District of California; that he be awarded a *supersedeas* upon said judgment and all necessary process including bail.

HERBERT CHOYNSKI,

JOHN T. WILLIAMS,

Attorneys for Petitioner.

Order Allowing Writ.

The foregoing petition for a writ of error is granted; the writ of error and the supersedeas therein prayed for pending the decision upon the writ of error are allowed, and the defendant Paul Oesting is admitted to bail upon the writ of error in the sum of Five Thousand Dollars.

The bond for costs upon the writ of error is hereby fixed at the sum of One Hundred (\$100) Dollars.

WM. H. SAWTELLE,

United States District Judge.

[Endorsed]: Filed Jun. 26, 1915. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [28]

*In the United States District Court, in and for the
Northern District of California.*

UNITED STATES OF AMERICA

vs.

PAUL OESTING,

Defendant.

Assignment of Errors.

Paul Oesting, defendant in the above-entitled cause and plaintiff herein, having petitioned for an order from said Court permitting him to procure a writ of error in this court directed from the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence made and entered in said cause against Paul Oesting, now makes and files with said petition the following assignment of errors herein upon which he will rely in applying for a reversal of said judgment and sentence upon said writ and which said errors, and each and every one of them are to the great detriment, injury and prejudice of said defendant and in violation of the rights conferred upon him by law and he says that in the records and proceedings in the above-entitled cause upon the hearing and determination thereof in the District Court of the United States for the Northern District of California there is manifest error in this, to wit:

1. That the said District Court erred in giving judgment against defendant for the reason that the indictment in said action fails to set forth sufficient facts to constitute an offense under the laws of the United States.

2. That the said District Court erred in sentencing said defendant for the same reason. [29]

3. That the said District Court erred in passing judgment for the same reason.

JOHN T. WILLIAMS,
HERBERT CHOYNSKI,
Attorneys for Defendant.

[Endorsed]: Filed Jun. 26, 1915. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [30]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Paul Oesting, as principal, and Louisa Oesting and P. H. Livingston, as sureties, are held and firmly bound unto The United States of America in the just sum of one hundred dollars, to be paid to the said United States of America, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of July in the year of our Lord one thousand nine hundred and fifteen.

WHEREAS, lately at a District Court of the United States for the Northern District of California in a suit depending in said court, between The United States and said Paul Oesting, a judgment was rendered against the said Paul Oesting and the said Paul Oesting having obtained from said Court a writ of error to reverse the judgment in the afore-

said suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, the condition of the above obligation is such, that if the said Paul Oesting shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

PAUL OESTING. (Seal)

LOUISA OESTING. (Seal)

P. H. LIVINGSTON. (Seal)

Acknowledged before me the day and year first above written.

[Seal]

FRANCIS KRULL. [31]

United States of America,
Northern District of California,—ss.

Louisa Oesting and P. H. Livingston being duly sworn, each for himself, deposes and says, that he is a freeholder in said district, and is worth the sum of one hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

LOUISA OESTING.

P. H. LIVINGSTON.

Subscribed and sworn to before me this 12th day of July, A. D. 1915.

[Seal]

FRANCIS KRULL.

[Endorsed]: Filed Jul. 12, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [32]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

I, Walter B. Maling, Clerk of the District Court of the United States of America for the Northern District of California, do hereby certify the foregoing 32 pages, numbered from 1 to 32 inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of the United States of America vs. Paul Oesting, numbered 5696, as the same now remain on file and of record in the office of the clerk of said District Court; said transcript having been prepared pursuant to and in accordance with "praecipe" (copy of which is embodied herein), and the instructions of the attorneys for defendant and appellant herein.

I further certify that the costs for preparing and certifying the foregoing transcript on writ of error is the sum of Twenty Dollars (\$20.00), and that the same has been paid to me by the attorneys for the plaintiff in error herein.

Annexed hereto is the original citation on writ of error (page 36) and the original writ of error (page 34), with the return of the said District Court to said writ of error attached thereto (page 35).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 21st day of December, 1915.

[Seal]

WALTER B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
12/21/15. C. W. C.] [33]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America,
To the Honorable, the Judges of the District
Court of the United States for the Northern
District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between United States of America, defendant in error, and Paul Oesting, plaintiff in error, which said cause is Number 5696, in the files and records of said court, a manifest error hath happened, to the great damage of the said Paul Oesting, plaintiff in error, *plaintiff in error*, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected,

the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the seventh day of December, in the year of our Lord one thousand nine hundred and fifteen.

[Seal] W. B. MALING,
Clerk of the United States District Court, for the
Northern District of California.

C. W. Calbreath,
Deputy Clerk.

Allowed by

M. T. DOOLING,
United States District Judge.

[Endorsed]: No. 5696. United States District Court for the Northern District of California. Paul Oesting, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Dec. 7, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Service of the within ——— by copy admitted this 7 day of Dec., 1915.

JNO. W. PRESTON,
U. S. Attorney, Attorney for Deft. in Error. [34]

Return to Writ of Error.

The answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within writ of error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 7th day of December, A. D. 1915, duly lodged in the case in this court for the within-named defendant in error.

By the Court:

[Seal]

W. B. MALING,

Clerk, United States District Court, Northern District of California.

By C. W. Calbreath,

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
12/21/15. C. W. C.] [35]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, To the United States of America, and to John W. Preston, Esquire, United States Attorney for the Northern District of California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of

error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, wherein Paul Oesting is plaintiff in error, and The United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 7th day of December, A. D. 1915.

M. T. DOOLING,
United States District Judge.

[Endorsed]: No. 5696. United States District Court for the Northern District of California. Paul Oesting, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed Dec. 7, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Service of the within ——— by copy admitted this 7th day of Dec., 1915.

JNO. W. PRESTON,
U. S. Attorney,
Attorney for Deft. in Error. [36]

[Endorsed]: No. 2712. United States Circuit Court of Appeals for the Ninth Circuit. Paul Oesting, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, First Division.

Filed December 21, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2712

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL OESTING,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

HERBERT CHOYNSKI,

JAMES RALEIGH KELLY,

Attorneys for Plaintiff in Error.

Filed

MAR 17 1916

Filed this.....day of March, 1916 D. Monckton,

Clerk

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2712

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL OESTING,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

This is an appeal from a judgment of fine and imprisonment after a plea of guilty to an indictment which does not state a crime. The judgment is error, because the plea of guilty is an admission of the truth of the facts set forth in the indictment and not a confession of the violation of any law. If the indictment does not set forth a crime, the plea of guilty does not admit the commission of a crime. This principle is so elementary that it should not need authority to support it, but nevertheless we cite a few authorities on this proposition.

In *Arbitranode v. State*, 67 Ind. 267, the defendant plead guilty and was fined; he appealed, claim-

ing the facts alleged in the indictment not to constitute an offense, and the court held:

“if it be true that the facts alleged do not constitute an offense, the appellant has lost nothing by pleading to the indictment. He may appeal and attack the indictment for the first time in this Court”,

citing *Henderson v. State* to the same effect, 60 Ind. 296, and other cases; also *Buskirk's Practice*, section 414.

It is held in *State v. Levy*, 24 S. W. 1026:

“* * * the attorney general contends that the defendants having pleaded guilty are in no position to question the correctness of the proceedings which resulted as aforesaid” (4-year sentence) “but this is a mistake. The effect of such a plea only amounts to an admission by record of the truth of whatever is *sufficiently* alleged in the indictment, and no confession, however large and explicit, will keep a defendant from taking advantage of faults appearing of record. *If no crime is charged in the indictment, then none is confessed by pleading thereto.*” Citing 1 Chitty Crim. Law, pp. 431, 662, 663; *Fletcher v. State*, 12 Ark. 169; 1 Bishop Crim. Procedure, section 795 and cases; Whart. Crim. Plead. (9th ed.) 413.

“Numerous decisions of this Court attest that a party defendant in a criminal case may take advantage of a material defect apparent of record, though such point be raised for the first time in this Court” (Supreme Court). Citing *McGee v. State*, 8 Mo. 495; *State v. Van Matre*, 49 Mo. 268; *State v. Meyers*, 99 Mo. 107, 12 S. W. 516; 1 Bish. Crim. Pro. sections 1368, 1370.

Other cases are:

Territory v. Miller, 4 Dak. 173, 29 N. W. 7;
 Boody v. People, 43 Mich. 34, 4 N. W. 549;
 Carper v. State, 29 Ohio St., 572;
 Crow v. State, 6 Tex. 334.

Held in Fletcher v. State, 12 Ark. 169, that by a plea of guilty defendant but confesses himself guilty in manner and form as charged in the indictment; and if the indictment charges no crime against the law, none is confessed.

It is said in 12 Cyc., page 801:

“Defendant may appeal from a judgment based on his plea of guilty, on the ground that the indictment does not state facts constituting a crime, as such a plea does not admit the validity or sufficiency of the indictment
 * * *.”

Similar language is employed at 12 Cyc. 436 and 12 Cyc. 484, there being numerous cases cited to substantiate the statements.

Defendant is accused of violating section 215 of the Federal Penal Code, which provides a penalty for using the United States mails in the prosecution of a scheme to defraud or obtain money by false pretenses.

It is alleged that Dr. Paul Oesting, who did business under several fictitious names, one of them being “Jordan’s Museum of Anatomy, a corpora-

tion", organized and existing under and by virtue of the laws of the State of California, did "under the guise and name of said Jordan's Museum of Anatomy", devise a scheme to defraud "by means of certain false pretenses, representations or promises" to be effected by means of the postoffice.

It is not a crime against the United States or against anyone else to do business under a fictitious name; the various statutes even prescribe certain prerequisites to the collection of debts by persons so doing business (sections 2466 to and including 2472 Civil Code of the State of California). Nor is it a crime on the part of Dr. Oesting for a corporation to devise a scheme, and to say that one schemed or acted "under the guise and name of a corporation" is no more than an accusation against the corporation. This is more particularly true as to the *scheme*, for one in *devising* a scheme acts privately, as distinguished from the publicity attached to the execution of the scheme. To say that one forms a conception under the "guise and name of a corporation", is to say that the conception is that of the corporation. He acts "for" the corporation; the "corporation" conceives the scheme. There is nothing uncertain or vague about the allegations as to who is making the scheme; either it is the corporation, or we have the delusions of insanity. If Dr. Oesting conceived a scheme "under the guise and name of a corporation" and his act was not the act of the corporation, then the doctor was insane, for the "scheme" was something in his

mind and he must have had a delusion that he was not Dr. Oesting, but

“* * * an artificial being, invisible, intangible, and existing only in contemplation of the law * * *” having the divine attribute in his physical being of “immortality”, “a perpetual succession of many persons * * *”,

these being some of the attributes of a corporation, according to Chief Justice Marshall, in the famous Dartmouth College Case, 4 Wheat. U. S. 518, 636.

Then the indictment alleges either that the scheme was that of another than the defendant, or that of an insane man.

And even were there a physical act, instead of an act of thinking, an act of the mind purely, the same thing must follow, for one cannot act as a corporation; there must be at least three directors, and a majority of these must act, in which case we would have a charge of conspiracy without a naming or identifying of the conspirators, or even a statement as to how many conspirators there were or that the conspirators were unknown to the grand jury.

But, supposing that Dr. Oesting devised a scheme and that he was not insane, let us see if the scheme was as the indictment attempts to allege, fraudulent. And the Court will please note here that our objection is not that there is any *uncertainty* as to whether or not the scheme is fraudulent, nor that all the statements that it is fraudulent are mere conclusions of law. We claim that it is *absolutely certain* that the scheme, which is set out in full, in

itself refutes the conclusions made as to its fraud; that the District Attorney cannot charge that a man conceived a certain scheme to defraud the public and against the peace and dignity of the United States; that the scheme consisted of eating cream cake on a public thoroughfare; that in the execution of that scheme he mailed a letter ordering the cream cake. The scheme itself would refute the conclusion as to its fraud and the defendant would be released, though he appealed after judgment of imprisonment on a plea of guilty, and without having made any exceptions in the trial Court as to the validity of the indictment.

This class of cases is akin to the prosecutions in state courts for obtaining money by false pretenses, of which cases it has been held, in accordance with common sense, that it is not sufficient to allege fraud, but the scheme must appear to be fraudulent and of such a nature as to be calculated to cause one to part with his money.

In *Roper v. State*, 33 Atl. 969 (N. J.), the indictment sets forth that defendant “knowingly, falsely and fraudulently” represented that a certain association was a bona fide building and loan association, engaged in business and with \$75,000 to loan; the existence of the association is negatived, and it is then set out that defendant did “wilfully, unlawfully and feloniously” obtain \$3000 with intent “to cheat and defraud”. It is held:

“In the first place the indictment is plainly insufficient. Its defect is that it does not set

forth any misstatement that could have caused the prosecutor to part with his money.” * * *

“In the case of *State v. Vanderbilt*, 27 N. J. Law, 328, it was declared that a false representation, to be a criminal pretense within the statute, must be of such a nature as will be sufficient to induce a man to part with his property, and must not be absurd in itself, considered as an efficient cause. * * * The rule of pleading in these cases is entirely settled. Lord Mansfield, in a case before him, said that the indictment must contain a history of the offense; that is the essential facts must be set forth to this extent; that is, if the facts stated shall be proved, the defendant’s guilt will be established * * *. The indictment before the Court on this record is fatally defective.”

In *People v. White*, 7 Cal. App. 99, an information for obtaining money under false pretenses alleges that W, in intending by false and fraudulent pretenses to obtain money of F with intent to cheat and defraud F, did “wilfully and unlawfully, knowingly and designedly, falsely and fraudulently” represent to F that M was a responsible business corporation; that M would pay F \$100 a week for 65 weeks upon receiving from him \$1 for 65 weeks; that other representations were made as to the responsibility of M; that all the representations were false as W knew; that F believed the representations and was thereby induced to deliver money to W.

The information is held bad.

“The indictment must show that the property was obtained by means of the false pretense alleged. Accordingly when there appears to be

no natural connection between the pretense and the delivery of the property, such additional facts as are necessary to show the relation must be alleged. A defect in the indictment arising from failure to show the connection between the false pretenses and the obtaining is a material one, and is not cured by verdict."

19 Cyc. 429.

This Court will notice that in both of the foregoing cases the indictments allege that the transactions were fraudulent and intended to deceive; that they did deceive; that they effected their objects and the money was actually obtained. Yet such allegations are given no weight since the *schemes* are themselves set out and negative the statements made as to their falsity, fraud and unlawfulness. And the defect is not cured by verdict.

What is the scheme?

Dr. Oesting is to advertise that Dr. Jordan *was* a physician practicing in San Francisco, specially qualified to treat certain diseases and had cured many such diseases. Dr. Oesting did not intend to claim in the advertisements that Dr. Jordan still existed at the time the advertising was done, but merely that he *was* a physician prior to that time. And the statement is true as far as appears from the indictment, which only denies the existence of Dr. Jordan at the time set out in the indictment, that is at the time of the advertising. Further, since the indictment says no Dr. Jordan existed at the time of the scheme or advertising, Dr. Oesting was entitled to adopt the fictitious name Dr. Jordan, since it be-

longed to no one else. There is no allegation that Dr. Jordan was a great doctor, or that he had ever existed, and that Dr. Oesting was deceiving the public by holding out that he was that great man.

There is no falsity, as far as appears from the indictment, in the statement (if we take another meaning from it) that Dr. Oesting himself, doing business under this fictitious name, was a physician, practicing in San Francisco, and specially qualified to treat certain diseases and that he had cured many such diseases; there is no denial in the indictment of the ability and knowledge of Dr. Jordan or Dr. Oesting as far as regards the practice of medicine; the allegation that he is a doctor and also the further allegation (which is not claimed to be untrue) that he stated he had been a practicing physician establish professional knowledge and ability. The moment that one is admitted to the practice of a profession, the fact of his knowledge and ability is established. In the eyes of the law an attorney admitted to practice today is as competent as the attorney who has been practicing for many years; and so also with a doctor; his ability cannot be attacked, whatever may be said as to his proper care and other such matters.

The indictment makes the conclusions that Dr. Oesting did not have "proper or professional knowledge of the condition of said persons" and did not have "proper or professional knowledge" of whether such persons were diseased or not, "*or whether or not said purported medicine or treat-*

ment was capable of benefiting said persons''; but that is as far as the indictment goes. It seems to be carefully worded to escape any possibility that the defendant might think himself accused of a crime. It alleges, rather than denies Dr. Oesting's professional knowledge and ability in the abstract. As far as this concrete case goes, the fact that letters and other data were to be received and considered shows he intended to have at least some knowledge of the conditions of the persons whom he was to treat.

The advertisements were intended to induce people to correspond with Dr. Jordan relative to real or supposed ailments and Dr. Jordan was to write to such persons and state to each of them with intent to defraud, "irrespective of the symptoms communicated *as aforesaid*", and even where the symptoms indicated health rather than disease, and without any proper knowledge of the real condition of said persons, that such persons were afflicted with diseases which Dr. Jordan could cure and that he would furnish treatments upon payments of sums of money.

As stated before, the allegation of "an intent to defraud" means nothing where the facts are all set out and show no fraud. The facts here show rather the *absence* of fraud, whereas an indictment must rather "negative the honesty of the pretenses" (United States v. Post, 113 Fed. Rep. 853). The symptoms communicated "*as aforesaid*", that is by letter, were not to be final, or in some cases

were to have no attention paid to them; which is perfectly proper, first, because there were *not only symptoms* communicated even in the letters or by mail, the letters being general as to “the real or supposed ailments”, and not confined merely to a list of symptoms. Samples of urine at least, and, as affirmatively appears, many other methods of determining the disease were as a matter of fact resorted to and intended to be resorted to, such as “chemical test papers” (trans. pp. 6 and 10), other data and records (trans. pp. 6, 10 and 22), samples of urine (trans. p. 22), not merely symptoms. The letters show also that personal interviews were requested by defendant. As a matter of fact a doctor might in many instances be wrong in prescribing only according to the symptoms communicated through the mail to him by his patient, and he is often justified in prescribing though there may be no symptoms at all apparent to the diseased person. Suppose a man to write Dr. Oesting to the effect that he has called to see a certain reputable physician in Modoc County, and been advised by the physician to procure a treatment for consumption or for syphilis; that there are no outward marks of the disease as yet or anything apparent to the diseased, or anyone else without special tests, but that, according to the said doctor, the disease does nevertheless exist in a dormant state and will soon become virulent unless treated. The doctor thinks best to use a certain medicine manufactured at Jordan’s Museum. Would not Dr. Oesting be

allowed to send the medicine? Would not he be allowed to make any suggestion which he deemed fit as to the cure of consumption or syphilis, and to send or suggest any other medicine that seemed to him proper for the treatment of those diseases? And without regard to the fact that the patient also sent a letter setting forth symptoms that indicate health? There is no allegation that Dr. Jordan or Oesting intended to tell well people that they were sick.

But suppose Dr. Oesting did intend to advise well people that they needed treatment? And suppose he did intend to so advise in certain cases where not only symptoms, but all tests, information, investigation and advice of other physicians showed health? Might he not still have been justified?

In diseases of the genito urinary organs the mind is a potent factor and often when a patient is absolutely normal and all his symptoms indicate health, it is necessary and imperative that treatment should be given him, thus removing the mental distress.

Dr. Robert W. Taylor, clinical professor of genito-urinary diseases at the college of physicians and surgeons (Columbia University) and consulting genito-urinary surgeon to Bellevue Hospital and also to the City (Charity) Hospital, New York, in his text book on genito-urinary diseases, third edition, says:

“Patients sometimes attribute want of sexual power, due to other cause, to varicocele and

therefore demand relief. So importunate are some of them, and so deaf to reasoning, that *the surgeon is forced to perform the operation for its mental effect.*"

It is common knowledge that people consult a physician complaining of an ailment, who on examination show no physical symptoms of disease, and yet the physician, in the proper and honest discharge of his duties, will agree with the patient and prescribe for him, giving him some harmless medicine and a great deal of encouragement, otherwise the person treated might worry himself into a serious condition.

There is a large class of people who must be so treated and they are by the medical profession termed "hypochondriacs".

Hypochondria is not a physical or functional disorder but is a nervous condition brought about by the patient imagining a fancied condition, and unless steps are taken by a pretended treatment, coupled with encouraging and helpful advice, the patient worries himself into a nervous condition far more serious than the pretended disease.

How often does a small child complain of being sick; the mother will pat the child on the back, give it a little water with sugar in it and say, "take the medicine and you will be well", and straightway the child will forget its ache and pain. If the mother did not do this the child would imagine a severe pain and genuinely suffer, whereas in fact it was merely mental. Here the mother

deceives the child, but can anyone say she does it fraudulently? Was it not done with an honest belief and a desire to help the child, and did it not accomplish its object?

One does not have to go far to find several persons always imagining themselves ill, and if these people on consulting a physician are told abruptly "nothing is wrong with you", they go away imagining themselves misunderstood and genuinely suffer pain, whereas, if the physician will agree with the patient and say, "Yes, here is a medicine" and give a harmless concoction, the patient will feel better and often be cured.

There is nothing in the indictment charging that the defendant, when symptoms, either alone or coupled with other data, indicated health, intended to advise treatment at all, and most certainly there is no charge that defendant intended to advise treatment when he did not honestly believe that it was to the best interests of the patient.

We feel that a fearful state of affairs would exist if every physician who should commit an error in the diagnosis of a case should be punished. The fact that a certain diagnosis, not always but generally follows certain given symptoms indicates the uncertainty of this branch of work of the medical profession, it is deprived of the exactness and nicety of other scientific subjects by reason of the fact that the nature of the symptoms are generally obtained from the patient who often because of his

ill health and the incidental mental affliction ensuing therefrom is not exact in his statement. Often a diagnosis is the result of guess work, and is based on statements that possess a more palpably objectional feature than do hearsay statements in their relation to the law of evidence. And even where symptoms and other evidence are before a number of eminent physicians in exactly the same way the physicians often disagree; witness the conflicting statements made on the trial of both civil and criminal cases in the Courts.

We have already stated that "proper knowledge", in view of the facts set forth means nothing. Nor does it matter whether the defendant doctor had any knowledge whatever of the real condition of the person corresponding, provided he *thought* he did, which is the real test of criminality, or provided he is advised by another doctor, either in his employ or not, and whom he trusts, that the facts in a particular case warrant or necessitate a particular treatment, or that the facts showed a disease that the defendant could cure, or thought he could cure.

It is not a crime for a doctor or a pharmacist or anyone else to ask for money for furnishing the treatment for a disease which a doctor has already determined to exist, or which he thinks to exist, after due inquiry made by himself or by someone whom he believes capable of determining the matter. If as a matter of fact there is no disease, still the doctor may prescribe if he thinks there is, in

the absence, of course, of criminal negligence. No criminal negligence, nor any negligence or intended negligence is alleged, any more than it is alleged that Dr. Oesting or Dr. Jordan intended to prescribe for persons whom he did not think afflicted. Only that he would claim disease to exist “irrespective of the symptoms theretofore communicated as aforesaid and even in cases where the symptoms indicated health rather than disease”; not in *all* cases where health was indicated, but, we take it, in cases where in spite of the indications of the symptoms communicated disease did nevertheless exist.

There is no doubt that the medicines and treatment were to be given as advertised, but the complaint is that Dr. Oesting was to send

“certain medicine or treatment not skillfully or properly designed, prepared and of little or no value, for the cure of the aforesaid persons, Dr. Paul Oesting, alias Paul Allen, then and there having no proper or professional knowledge of such persons’ conditions, or whether such persons were diseased or not, or whether or not such purported medicine or treatment was capable of benefiting said persons, as he, the said Dr. Paul Oesting, alias Paul Allen, then and there well knew”.

The Court will notice that there is no allegation that Dr. Oesting knew the medicine or treatment was not properly designed or prepared, or even thought so, but the contrary is shown, for it is alleged that he was to send the medicine and treatment “for the cure of the aforesaid persons”.

There is no uncertainty about the allegation that at some time Dr. Øesting had no proper or professional knowledge of the conditions of the persons to be treated, and that he knew he did not have this knowledge; but it is not alleged that he had *no* knowledge of the persons' conditions; proper and professional knowledge is not necessary; nor as a matter of fact is any knowledge necessary; the pharmacist who follows the direction of the doctor has no knowledge of the condition of the person who is to use his medicine; the doctor does not in all cases personally ascertain the condition of his own patient, he sends samples of the blood and urine to the chemist to make tests, he gets second-hand information from internes as to symptoms; he takes the word of less famous doctors in his employ; he has no professional knowledge whatsoever as to the condition of his patient; yet he prescribes for the disease. He thinks and believes the patient is ill, yet he does not know it.

So as to the alleged lack of proper and professional knowledge of the efficacy of the medicines and treatment. The pharmacist does not even know for whom his medicines are intended, nor what disease they are intended to treat. The doctor uses without question medicines made according to secret formula, not knowing what they contain; he only knows that other doctors have told him that in certain cases the formulae are effective; or perhaps he has read it out of a book.

We are asked to consider it a criminal scheme to enter into communication with various parties; ascertain their condition by various means; disregard the symptoms which they claim to have observed, and which do not bring us to the same conclusion as urinary analysis, blood tests, the testimony of competent physicians who have made physical examinations, pressure experiments, the symptoms observed by others more competent to judge than the afflicted persons, and other data; tell them of their conditions and ask money for prescribing for the diseases; send medicines for their cure, which we think are excellent, but do not know to have been prepared with the proper care and precaution, since we have not personally supervised the preparation either of the medicines or of the various elements contained in them.

If such a scheme is criminal, then every doctor who bases his analysis of the disease on anything outside of the symptoms observed by the patient should be in jail; every physician who sends his patient to have a prescription filled at a drug store belongs in the penitentiary; every professional man who makes a mistake is a scoundrel.

We respectfully submit that the defendant was sentenced for admitting a set of facts not criminal and that the sentence is error.

Dated, San Francisco,
March 15, 1916.

HERBERT CHOYNSKI,
JAMES RALEIGH KELLY,
Attorneys for Plaintiff in Error

No. 2712

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

DR. PAUL OESTING, alias PAUL ALLEN,
Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

**BRIEF OF THE UNITED STATES
OF AMERICA**

JOHN W. PRESTON,
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Attorneys for Defendant in Error.

Filed

MAR 25 1916

F. D. Monckton,
Clerk.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

No. 2712

IN THE
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DR. PAUL OESTING, alias PAUL ALLEN,
Plaintiff in Error,

VS.

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Defendant in Error.

**BRIEF OF THE UNITED STATES
OF AMERICA**

Paul Oesting, plaintiff in error, has appealed from the judgment of fine and imprisonment rendered in the United States District Court for the Northern District of California, First Division, after a plea of guilty, and here contends that the indictment in the said action does not charge an offense under the laws of the United States.

Plaintiff in error at no stage of the proceedings in the lower court raised any objection whatsoever to the indictment, and attempts to raise the point for the first time upon appeal. This we assert he cannot do, and we submit that there being no matter before this Court which it can review on this appeal, the writ of error of plaintiff in error should be dismissed.

Counsel for plaintiff in error have cited certain authorities in support of their contention that they have a right to raise the question of the sufficiency of the indictment for the first time in an appellate court, and while we concede that such may be, or at least may have been, the law in a few states, the preponderance of authority is opposed to such a proceeding, and even in Indiana, upon whose early decisions plaintiff in error relies, a statute enacted in 1911 has provided that objections not taken by demurrer or answer are waived; and under this statute it was held in 1914 in

Boos v. State, 181 Ind. 562 (105 N. E. 117)

that an assignment of error that an indictment does not state a public offense, is of no avail when first raised on appeal. Also see

Atkinson v. State, 33 Ind. App. 87 (70 N. E. 560).

Opposed to the position of the courts of Missouri, as shown in cases cited by plaintiff in error, is that of the court in

Edina v. Beck, 47 Mo. App. 243 (1891).

We quote:

“This does not give the defendant a right to appeal from a judgment where there is nothing to be tried by the appellate court. * * * A defendant cannot plead guilty, and when the fine imposed is greater than he expected, try to withdraw his plea of guilty upon appeal.”

And opposed to the earlier holding of the Superior Court of Arkansas in 1850 in *Fletcher v. State*, 12 Ark. 169, cited by plaintiff in error, is that in

Briones v. State, 105 Ark. 82 (150 S. W. 416), decided in 1912, wherein it was held that one convicted of a criminal offense who has not challenged the form and sufficiency of the indictment below, cannot complain thereof on appeal.

In the following cases it will appear that in many states it has long been established that where no objection to the indictment has been made in the trial court, objections thereto cannot be taken for the first time on appeal.

“Defendant should avail himself of a defect in the indictment by demurrer, motion to quash or motion in arrest of judgment. He cannot rely on an assignment of errors apparent on the indictment’s face, made in a petition for appeal.”

State v. Arthur, 10 La. Ann. 265.

Under Cr. Pract. Act, Sec. 217, providing that defendant by failure to demur to an indictment waives all defects therein except that the court has no jurisdiction of the offense, and that the indictment does not state facts constituting an offense, an objection to the indictment on the latter ground *cannot be raised for the first time on appeal*.

Ter. v. Garland, 6 Mont. 14;

State v. Malish, 15 Mont. 506.

Where accused proceeds to trial upon an indictment without objection and there is evidence sufficient to sustain a conviction, he will

not be allowed on appeal, to raise a question as to the sufficiency of an indictment.

People v. Moran, 161 N. Y. 657 (57 N. E. 1120).

Defects in the manner in which an offense is charged in the information cannot be first urged on error.

Tway v. State, 7 Wyo. 74 (50 P. 188).

The sufficiency of an indictment will not be considered, where the objection was not raised by demurrer or by motions to quash or in arrest.

Church v. Ter., 14 N. M. 226 (91 Pac. 720).

Objections to the indictment must be made in the trial court. In the absence thereof there is no error before the appellate court.

Palmer v. State, 121 Tenn. 465 (118 S. W. 1022).

An objection to the information not raised at the trial cannot be considered on a writ of error.

(1910) *McQuery v. People*, 48 Colo. 214 (110 Pac. 210).

The Supreme Court cannot determine in the first instance the sufficiency of an information.

(1910) *State v. Smart*, 118 Wyo. 436 (110 Pac. 715).

Accused having pleaded not guilty and gone to trial cannot on appeal raise the objection of uncertainty in the indictment.

Johnson v. State, 3 Ala. App. 98 (57 So. 389).

Under Crim. Proc. Act, Sec. 44, an objection to an indictment held not available when raised for the first time in a court of review.

State v. Merkle, 82 N. J. Law 172 (83 A. 186).

The sufficiency of an indictment cannot be reviewed when raised for the first time on appeal."

Check v. Commonwealth, 162 Ky. 56 (171 S. W. 998).

An assignment of error assailing the sufficiency of an indictment cannot be considered where the question is first presented on appeal.

Pace v. State, 152 Ind. 343 (1899).

"As no ruling of the court below upon the validity of the indictment was legally invoked, this court cannot consider an assignment of error based upon the failure of the trial court to rule in accordance with the contention of plaintiff in error."

So. Exp. Co. v. State, 114 Ga. 226.

A writ of error does not properly lie for matters—e. g., the insufficiency of an indictment—which could have been taken advantage of by demurrer or motion in arrest of judgment.

Davis v. State, 39 Md. 355.

Thus far, no authorities have been cited as to the law on this subject in the federal courts; the question seems not to have been raised there until quite recently. But in

Pickett v. U. S., 216 U. S. 456; 54 L. Ed. 566, 569;

the court held that *objections to the sufficiency of an indictment cannot first be raised upon writ of error.*

This would seem to be conclusive in the present case. Furthermore, attention is called to pages 32 and 33 of the Transcript of Record herein, where, in the Order Directing Entry of Plea of "Guilty", etc., and Judgment on Plea of Guilty, it appears that defendant, when asked if he had any legal cause to show why judgment should not be pronounced against him, showed none.

We submit that there is no matter properly before this Court for its consideration, and that, therefore, the said appeal should be dismissed.

Counsel have attacked the indictment herein on the ground that it does not show that this defendant has devised a scheme or that said scheme was one to defraud or for obtaining money or property by means of false pretenses, representations or promises. They contend first that the said indictment charges not that defendant conceived the alleged scheme, but that the "corporation" conceived it, and second, that the said scheme as set forth shows on its face that it was not fraudulent.

To say that the indictment does not charge defendant, but a corporation, with having devised the scheme set forth is to do violence to the plain language thereof, for it sets forth (Tr. pp. 2, 3) "That Dr. Paul Oesting, alias Paul Allen, doing business

at 298 Market Street, in the City and County of San Francisco, in the State and Northern District of California, under the name of Dr. Jordan, J. L. Jordan, Incorporated, and Dr. Jordan's Museum of Anatomy, a corporation organized and existing under and by virtue of the laws of the State of California, late of the said State and District, heretofore, to wit, on or about the 15th day of May in the year of our Lord one thousand nine hundred and twelve, in the City and County of San Francisco, State and Northern District of California within the jurisdiction of this Court, and under the guise and name of said Jordan's Museum of Anatomy, devised a certain scheme or artifice to defraud" etc., which allegation, after we eliminate the modifying phrases and clauses, certainly directly states in unmistakable language, "That Dr. Paul Oesting, alias Paul Allen, * * * devised a certain scheme or artifice". Unwilling as we are to accept counsel's alternative set forth on p. 4 of their brief, we feel compelled to assert that it is not the corporation who is making the scheme.

The scheme as set forth in the indictment, and stripped of the accompanying legal verbiage is, that the defendant, under the assumed name of Dr. Jordan, should, by means of advertisements, induce certain persons named, and others to the grand jurors unknown, to communicate with him relative to real or supposed ailments, and that defendant should then by means of letters, and through the Postoffice Department, and irrespective of any

symptoms communicated to him, and even in cases where the symptoms indicated health rather than disease, and without any real knowledge of the condition of the person so induced to communicate with him, state to such person that he was afflicted with a disease which the defendant could cure, and that he would furnish treatment for such disease for a certain sum of money, and by means of such letters would induce such person to send him money for the purpose of procuring medicine and treatments skilfully and properly designed and prepared for the cure of the disease with which such person was afflicted, or had been induced by him to believe himself afflicted, which money he would fraudulently convert to his own use, and in return therefor should send to such person certain medicines of little or no value and not medicine and treatment skilfully and properly designed and prepared for the cure of such person, the defendant having no real or proper knowledge of such person's condition, or whether he was diseased or not, or whether or not such purported medicine was capable of benefiting such person, *as he well knew*.

It is contended upon demurrer to the indictment that for many reasons the foregoing scheme is not one to defraud within the meaning of Section 215 of the Criminal Code. This contention is unsupportable. When it is averred that a physician has devised a scheme to defraud by stating to one who offers himself as a patient that such person is afflicted with a disease which the physician can

cure, and this irrespective of the symptoms, and whether or not the symptoms indicate health rather than disease, and without any real knowledge of the condition of such person, and by such statement should cause and induce such person to send him money, for which he would send in return medicine of little or no value, and not medicine skilfully and properly designed and prepared for the cure of the disease with which such person was afflicted or had been induced by such physician to believe that he was afflicted, I think it clearly appears that the physician was engaged in one of the most reprehensible schemes to defraud of which the law can take cognizance.

It may indeed be quite true that medicine is not an exact science, and that there is a wide divergence of opinion even among reputable physicians as to what is the proper method of treatment for any particular disease. But this fact is beside the mark here. All such treatments contemplate at least *good faith* on the part of the physician and are not based upon a deliberate design upon his part to procure money from a person who so far as the physician knows or has reason to believe, is in sound health by stating to him that he is afflicted with a disease.

Counsel for defendant also contend that this class of cases is akin to the prosecutions in state courts for obtaining money by false pretenses, but this is not true. In

Durland v. U. S., 161 U. S. 306 (40 L. Ed. 709),

it was contended that the statute only contemplates such cases as come within the definition of "false pretenses" at common law. But the Court, speaking by Mr. Justice Brewer, said:

"It (the statute) includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose. * * * And it would strip it of its value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurements of a promise."

It is held in

Brooks v. U. S., 146 Fed. 223,

that if the scheme is sufficiently outlined to show its design and adaptability to deceive, and to fairly acquaint the accused with what he is required to meet, it answers the requirement of the statute. The Court said:

"The most successful schemes to defraud are those dressed in the garb of honesty and hedged about with all the appearance of legal and enforceable undertakings. If the intent and purpose is to deceive and defraud the unwary it matters not what form the project is made to take."

In *U. S. v. Loring*, 91 Fed. 881, the Court said:

"The object of the law was to prevent persons having fraudulent designs on others from using the postoffice as a means of effecting such fraud. It need not in my opinion be a fraud either at

common law or by statute. It is enough if it was a scheme or purpose to defraud any persons of their money.”

Although the Federal courts have interpreted Section 215 of the United States Penal Code and Section 5480 of the Revised Statutes, on which it is founded, and have defined a scheme to defraud therein referred to, innumerable times, counsel for plaintiff in error seem not to have been able to find any cases to sustain their assertion that this indictment does not set forth a scheme to defraud.

The contention of counsel on page 8 of their brief that the allegation that “Dr. Jordan was a physician” as used in the indictment (Tr. p. 2), referred to a time prior to the date of the alleged offense only, is mere quibbling. And an effort to set up that by the terms of the indictment plaintiff in error was shown to be a physician practicing in San Francisco, and qualified to treat certain diseases, is somewhat ingenious, but not founded on fact. Nowhere in the said indictment does it appear that plaintiff in error was in fact a physician, unless it is to be inferred from the use of the title “Dr.” applied to him, and that is not conclusive as that title is in general applied impartially to doctors of law, of divinity, of dentistry and of veterinary science.

The indictment clearly charges that plaintiff in error intended to secure money from afflicted persons and persons who thought themselves afflicted,

by misrepresentations, and that irrespective of their symptoms, he would assume to furnish treatments and proper medicines for the cure of alleged diseases upon the payment of certain sums, then and there not knowing what the real physical condition of the said patients was, whether they were diseased or not, or whether the purported medicines and treatments were capable of benefiting said persons. Can it be honestly contended that these allegations show absence of fraud, and do not tend to “negative the honesty of the pretenses”?

The indictment and the facts in the case of *MacKenzie v. U. S.*, 209 Fed. 289, 290, are exactly similar to those in the case at bar. That indictment stood the test before the Circuit Court of Appeals, and was used as a model in preparing the indictment now before this Court, and a copy of the same was furnished this office. Judge McPherson in that case said that the gist of the offense was the falsity of the scheme and the knowledge on the part of defendants that the scheme was false. The learned judge quoted with approval the instructions to the jury by the lower Court:

“ * * * he told the jury that the government * * * was also charging that the defendant knew that the letters sent to him by certain witnesses for the government—* * * ‘showed no condition of disease; that the defendant knew that they showed no condition of disease, but, notwithstanding that, by his correspondence or his letters he led the persons sending those

letters to believe that they were suffering with serious disease which he could cure; that this was false; and that he knew it to be false'."

The indictment before this Court shows that the defendant *knew* and *intended* his representations to be false.

The case of *Miller v. United States*, 133 Fed. 337, 347, is a case in point, charging the use of the mails to defraud, and the opinion discusses at some length the matter of the allegation of intent in the indictment.

"Finally it is seriously argued that the indictment contains no adequate averment that the defendants ever had any intention to defraud anyone, and the case of *United States v. Post* (D. C.) 113 Fed. 852, is cited in support of this proposition. The alleged facts in that case bear so little analogy to those here presented that the opinion in it is neither controlling nor persuasive. * * * These allegations adequately disclose an intention on the part of the defendants to defraud the members of this corporation. They could not have committed the acts which they agreed to devise and to do without despoiling them. Everyone is presumed to intend the natural and inevitable consequence of his acts. The defendants could not have agreed to do these acts, the patent consequence of which was to defraud the members of this corporation, without intending to defraud them. The objection that the indictment does not adequately show the intention of the defendants to defraud the members of the insurance company cannot be sustained."

In *Lemon v. United States*, 164 Fed. 953, 957, it is stated that the intent need not be pleaded with particularity.

“The averments of the indictment thus epitomized disclose a scheme or artifice well designed and adapted to deceive, and describe it with sufficient certainty to show its existence and character and to fairly acquaint the accused with what they were required to meet. *Such, without the certainty and particularity required in describing a substantive offense in a criminal charge, is all that is necessary in stating the first element of the offense denounced by Section 5480. Brooks v. United States*, 76 C. C. A. 581; 146 Fed. 223.”

Other authorities which go to sustain the sufficiency of the allegations in the indictment to set forth a scheme to defraud, within Section 215 of the Criminal Code of the United States, follow.

In *U. S. v. White*, 150 Fed. 379, 390, the Court in instructing the jury said:

“The point which you are to consider and determine is, not whether it is possible that the things which the defendant promised to do could be done by anyone, but whether it has been proven to you that this defendant did not *intend* to do what he promised he could and would do.”

It is not necessary that the scheme should be fraudulent on its face; though it is apparently a legitimate business, it is within the statute if there was an intention not to conduct such business honestly, but to use it to defraud.

McConkey v. U. S., 171 Fed. 829.

Such scheme may be found in any plan to get money or property of others by deceiving them as to the substantial identity of the thing which they are to receive in exchange, and this deception may be by implication as well as by express words.

Harrison v. U. S., 200 Fed. 662.

The scheme need not be fraudulent on its face; it is only necessary that it involve some plausible device reasonably calculated to deceive.

U. S. v. Young, 215 Fed. 267, citing *Rumble v. U. S.*, 143 Fed. 722.

“It seems to be well established that, where a plan discloses any scheme to defraud by which it is sought to obtain the goods of another by false representations as to the thing they are to receive in return for their property, it renders such person liable to indictment under this statute.”

Charles v. U. S., 213 Fed. 707, 712.

Counsel's discussion on page 12 and the following pages of their brief of the possibility that the kind of healing that plaintiff in error intended to give his prospective patients was mental rather than physical, may have merit as a medical treatise, but is beside the question here. Furthermore, it is charged in the indictment (Tr. p. 5) that said Dr. Paul Oesting had “no proper or professional knowledge of such persons' conditions, or whether such persons were diseased or not, or whether or not

said purported medicine or treatment was capable of benefiting said persons, as he, the said Dr. Paul Oesting, alias Paul Allen, then and there well knew.”

While it may be true that, as counsel say on page 13 of their brief, that “It is common knowledge that people consult a physician complaining of an ailment, who on examination show no physical symptoms of disease, and yet the physician, in the proper and honest discharge of his duties, will agree with the patient and prescribe for him, giving him some harmless medicine and a great deal of encouragement, otherwise the person treated might work himself into serious condition,” a reference to the letters set forth in the indictment, the mailing of which is not denied, shows that they were not particularly well calculated to furnish “a great deal of encouragement.”

We respectfully submit that the indictment herein is amply sufficient as setting forth a violation of Section 215 of the Criminal Code of the United States, and that even if this Honorable Court should be of the opinion that the assignments of error made by plaintiff in error here are properly before it for consideration, the judgment of the lower court should be affirmed.

JOHN W. PRESTON,
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ANNETTE ABBOTT ADAMS,
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Attorneys for Defendant in Error.

No. 2712

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

HERBERT CHOYNSKI,

JAMES RALEIGH KELLY,

Attorneys for Plaintiff in Error.

Filed

Filed this.....day of April, 1916.

APR - 7 1916

F. D. Monckton

FRANK D. MONCKTON, Clerk.

Clerk

By.....Deputy Clerk.

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

The brief submitted in behalf of the Government devotes considerable space to a citation of authorities designed to show that the plaintiff in error cannot, for the first time in an appellate Court raise the question of sufficiency of an indictment.

It would seem as if the principle that a complaint "which does not state facts sufficient to constitute a cause of action" or "sufficient to constitute a public offense", cannot support a judgment of any kind, is so elementary as to need no citation of authority in support thereof; and that advantage may be taken of such defect "at any stage of the proceeding".

This rule has been modified, in some respect, by statutory enactment in some of the states, and it

is to cases arising under this modified rule that the attorney for the defendant in error has gone for authority in support of his contention.

An inspection of these cases will show that the general principle has never been violated. An analysis of such citations of authority in the brief of the defendant in error discloses that the Government's attorney misunderstands the reasoning of these cases.

In *Boos v. State*, 105 N. E. 117, although the indictment was held good the Court seemed to be of the opinion that even where there is a statute to the effect that the insufficiency of the indictment cannot be first raised on appeal, still it can be first claimed on appeal that the indictment does not state an offense. The cases cited in this decision seem to take the same stand, without absolutely deciding upon it.

Atkinson v. State, 33 Ind. App. 87; 70 N. E. 560,
Held:

“An indictment *may* be thus attacked by the defendant for the first time on appeal, but such attack will not prevail, *except* where there is an omission in the indictment of some criminal charge; and the *mere want of certainty* in the statement of the facts constituting an offense cannot be grounds for so questioning the indictment.”

Edina v. Beck, 47 Mo. App. 234: Here defendant was fined fifty dollars in the Mayor's Court for being drunk and disorderly and resisting an officer.

The transcript showed “ * * * a valid charge, plea and judgment”.

“ * * * the conclusion follows that the appeal was properly dismissed, unless we can hold that a party may appeal from a judgment *properly* entered against him, upon his plea of guilty, which is in effect a judgment by confession. This we cannot hold * * * ”

“ * * * This does not give the defendant a right to appeal from a judgment where there is nothing to be tried by the appellate court * * * A defendant cannot plead guilty and when the fine imposed is greater than he expected, try to withdraw his plea of guilty upon appeal.”

N. B.—The constitutional amendment relating to necessity of indictment or presentation refers only to crimes which are infamous, i. e., felonies.

Briones v. State, 105 Ark. 82; 150 S. W. 416: The complaint is not that the indictment does not state an offense, but that it charges the same offense in two different ways, to wit, the entering of a house for two purposes, one to commit rape and one to commit grand larceny.

State v. Arthur, 10 La. Ann. 265: Here the objections were as to the formal defects and not that the indictment did not set forth an offense.

State v. Lubin, 42 La. Ann. 79; 7 So. 68: The case of State v. Arthur is referred to with approval on one point and ignored when the question of application to a case where no crime was charged came into consideration. In State v. Lubin, the Court below had held that an objection to an indictment for

extortion which failed to state that accused held an office, “was one of form and not of substance, and that therefore, the objection came too late after the jury had been impaneled”, Held:

“Under the statute it is too clear for argument that one who is not a ‘judge, justice of the peace * * * or other civil officer’ *cannot* be guilty of oppression under the color of his office * * * ”

“It is thus apparent that the information lacked an essential ingredient, without which *no crime was charged* and no conviction could legally be obtained.”

“We are clear in the conviction that the omission was not of the kind which is cured by joinder of issue and verdict.”

Ter. v. Garland, 6 Mont. 14; State v. Malish, 15 Mont. 506: The attorney general neglected to state that the section of the Montana act, partially set out in his brief, further provides as to the objection requiring jurisdiction or that the indictment does not set forth an offense. The provisions is that “these he may take advantage of on the trial, or on motion to arrest judgment”. Held:

“The *statute* having provided the method of procedure to take advantage of such a defect, that method must be pursued.”

We are not interested in the point decided in People v. Moran, 161 N. Y. 657; 57 N. E. 1120. It is there held that

“the indictment was sufficient to charge the defendant of the commission of a crime”.

Thereafter the Court goes on to say, as a mere expression of opinion, having no bearing on the decision of the case, that

“ * * * *as there was evidence sufficient to sustain a finding of the jury that the crime charged was committed, the defendant should not be allowed on appeal for the first time to raise a question as to the sufficiency of the indictment.*”

There is not even a claim made in that case that it did not state a public offense; as a matter of fact it did state a public offense, and had there been any uncertainties, they were supplied by the evidence. Supposing that case to decide that where an indictment does not state a public offense, the deficiencies may, in the absence of objection, be supplied by evidence, we cannot see its application here. We might admit such a proposition without affecting our contention in this case, and we can see where there might be some reason to support such a rule; but we cannot see how one can be sentenced to jail for a crime which he has neither confessed nor been shown to have committed. If one can be sentenced for the commission of a crime actually proved to have been committed by him, it does not follow therefrom that he can be sentenced for a crime which there is nothing to show that he has committed and which he has not been accused of; the indictment in both cases being the same, in the one case, the man has actually committed a crime and might not be allowed to object to the fact that he has been accused of it partly through an indictment

and partly through evidence, but in the other case he has not been accused of the crime at all and has not been shown to have committed it.

In *Tway v. State*, 50 Pac. 188, it is held:

“The alleged defect being *in the manner in which the offense was charged* the objection should have been made * * * in the court below * * * but the information is in the language of the statute and is sufficient.”

We do not claim that where a public offense is charged, objection can be made *in the manner in which it is charged* for the first time on appeal.

In *Church v. Territory*, 91 Pac. 721, it is assigned as error that the Court erred in overruling defendant's motion in arrest of judgment. No demurrer or motion to quash was filed. The appellate Court held:

“That *where there was a clerical mistake* in an indictment for a *misdemeanor*, defendant cannot raise the point for the first time upon motion in arrest of judgment, he should demur or move to quash.”

“As to whether the omission of the word ‘did’ as in the indictment in this case, would be fatal or not we do not decide, but *as the charge is a misdemeanor only*, and the punishment assessed a fine of fifty dollars and costs, we are of the opinion that the Court did not err in overruling the motion in arrest of judgment.”

In this case there is only a matter of a clerical error and it is held that in a case of *misdemeanor* such an error can only be objected to in a certain way. The case of a misdemeanor is especially dis-

tinguished from that of a felony—State v. Halder, 2 McCord (S. C. 377), being referred to as showing that in the case of a felony the same error would have been fatal and the judgment arrested.

In the case of Palmer v. State, 118 S. W. 1022 (Tenn.), it is claimed that the indictment was insufficient because a certain word was not used, although the full crime is charged in the words of the statute. The Court holds:

“Objections made to the indictment must be made in the lower Court.”

And in the next paragraph:

“Objection to the *form* of the indictment are *generally* waived, by going to trial without calling the attention of the trial judge to them.”

The Court goes on to state that the general demurrer has been abolished by the Tennessee code, and further that the indictment as a matter of fact is a good one,

“ * * * even if the objection * * * had been made in the Court below, in ever so specific a form, it must have been held of no avail.”

McQueary v. People, 110 Pac. 210: A motion to quash indictment was in this case denied. On appeal it is claimed, that the motion should have been granted for the reason that indictment charged both a statutory and common law offense. The Court Held:

“ * * * that the reason often announced that a question not raised below *which may be waived*, will not be considered on review, the

defendant is estopped from presenting it here. But, aside from this, the information is not open to the attack made.”

It is apparent that the Court in this case considered that certain matters may not be waived upon failure to object to them before appeal; but that an objection which is a ground of special demurrer and not of general demurrer is waived by not raising it before appeal.

State v. Smart, 110 Pac. 715, did not touch the points at issue at all; all points raised in the Supreme Court were raised in the lower Court by demurrer, motion to quash and motion in arrest of judgment; but it was held that the points were not properly brought for decision in the Supreme Court but should have been decided by the District Court of Appeal and the case was sent by the Supreme Court to the District Court of Appeal to be there decided.

We are not interested in the matters claimed to have been decided in the case of Johnson v. State, 3 Ala. App. 98, as that case merely held that the point of uncertainty cannot be raised for the first time on appeal. This is true; but has no bearing upon the matter in hand.

In State v. Murkel, 83 A. 186 (N. J.):

“The single defect in the indictment which is assigned before us * * * is the failure to aver in it the name of the person from whom the defendant solicited the bribe. * * * No *such* objection to the indictment as that now alleged before us was taken on the motion to

quash, and the statute is a bar to its consideration for the first time in a Court of review."

The statute referred to provides * * * :

"* * * Every objection to any indictment, for any defect of form or substance apparent on the face thereof, shall be taken by demurrer or motion to quash * * * before the jury shall be sworn, *and not afterwards.*"

The cases cited as a basis for the foregoing case indicate that where the objection is that "no crime was charged", even the statute does not prevent a consideration of the indictment for the first time on appeal (Mead v. State, 23 A. 264; and State v. Sharkey, 63 A. 866).

It is to be noticed in the above case that it is not decided what would have been the ruling had the objection been made that the indictment did not state a public offense. It is also to be noticed that in this case, as in every other case, cited by the Government, that the decision has been on another point than the proposition that the indictment does not state an offense. We believe that even did a statute provide that no appeal could be taken upon the point that the indictment did not state an offense, such a statute would be unconstitutional, for the reason that a man would be deprived of his liberty without anything to show that he had committed a crime; the constitutional question has never been raised in any of these cases, for the reason that in all of them it is

held that the indictment is in any event a good one, and does state an offense.

Check v. Commonwealth, 171 S. W. 998 (Ky.):

“The indictment charges a public offense. It is merely insisted that the offense is imperfectly pleaded. * * * That being true, the sufficiency of the indictment cannot be considered when raised for the first time in this Court.”

Pace v. State, 152 Ind. 343: The brief of the defendant in error quotes from the syllabus, and not from the decision. It is claimed:

“The Court erred by holding defendant to trial upon an insufficient indictment.”

Held:

“Counsel for appellant, for the first time seeks to assail the sufficiency of the indictment under the second specification. It is manifest that this assignment, *as formulated*, presents us questions for our consideration. Barnett v. State, 141 Ind. 149.”

The case upon which the decision is based holds as to an indictment that is attacked for uncertainty and other grounds.

“There is no *contention* or objection, and none in our opinion could be successfully interposed upon that ground, that these pleadings * * * do not charge a public offense of which the Court had jurisdiction.”

Southern Express Co. v. State, 114 Ga. 226: The indictment is not attacked on grounds that it did not state an offense, but it is claimed that de-

fendant, being a corporation, could not be indicted for the offense.

“The defendant could have invoked a ruling of the Court to the effect that it could not legally be indicted for the offense charged, by demurring. * * * It was too late after voluntarily going to trial on the merits, to contend ‘that a corporation * * * was not indictable under the section * * *, * * * as no ruling of the Court below upon the validity of the indictment was legally invoked.’”

The Court cannot consider an assignment of error, based upon the failure of the trial Court to rule in accordance with the contention of plaintiff in error.

Davis v. State, 39 Md. 355: We are unable to find any such language as is quoted in the reply brief. The language is:

“The errors assigned, if any, were subjects of demurrer or in arrest of judgment, and in this case there was neither. The code, Article 30, Sec. 82, prohibits reversal for any matter or cause, which might have been the subject of demurrer to the indictment.”

No claim that a public offense was not stated; the objection as to the clearness of the statement and that the degree of murder, etc., were not stated.

Pickett v. U. S., 216 U. S. Supreme Court Report, 456, shows that it has no reference to an action of this kind. The words of the Court are as follows, to wit:

“The third and fourth errors assigned are for overruling an objection made to the suf-

iciency of the indictment and to the admission of any evidence because the indictment was bad. No such objection is shown by the record. The indictment *is not in form bad nor vague, but charges the crime of murder with great particularity.* There seems to have been *no reason for doubt as to the crime charged;* besides objections *of this character* cannot be made upon a writ of error for the first time.”

It appears then, that at the trial objections were made to the taking of evidence on the ground of the insufficiency of the indictment. The Court holds that “No such objection is shown upon the record” and that, being an objection to evidence it must appear on the record before it can be considered from the point of view that an error has been committed in the ruling of the Court upon the evidence. The Court then goes on, however, to consider the indictment; no reason is given for its consideration; but the only inference can be that, though the objection as to the admission of evidence might not be a good one, since it does not appear upon record, still, an objection on the same grounds to the judgment should be a good objection if the indictment does not state a public offense, and cannot therefore support the judgment. In other words, an objection to admission of evidence must appear on the record no matter upon what ground the objection is taken; but an objection to the judgment based upon the same ground, where the ground is that the indictment does not state a public offense, may be taken for the first time in the Court of Appeal.

Now the objection to the sufficiency of the indictment is held not to be a good objection for the reason that "The indictment is not, in form, bad nor vague, but charges the crime of murder with great particularity. There seems to have been no reason for doubt as to the crime charged". And here the Court tells us that no objection as to *bad form* or *vagueness* of the indictment can be taken for the first time on appeal. The Court does *not* say that *no* objection can be taken to the indictment for the first time on appeal, nor are we to understand that an objection that the indictment does not state a public offense must necessarily be taken before the appeal. The Court only says that the objection "cannot be made upon a writ of error for the first time" where it is made upon the ground that there is "reason for doubt as to the crime charged".

Our appeal is not made upon the ground that the indictment in this case is "in form bad or vague" or that there is "reason for doubt as to the crime charged", but our claim is that there is no crime charged at all; neither is our objection made to the taking of evidence, for, defendant, having pleaded guilty no evidence is taken.

There seem to be no authorities directly holding that a defendant can appeal under the Federal practice after a plea of guilty, upon the ground that the indictment does not state a public offense; but there are certainly no authorities to the contrary.

In the case of United States v. Bayoud, 16 Fed. 376, the Court takes it for granted and as an established fact that a defendant may appeal after plea of guilty, for, the defendant in that case *actually did* appeal and the Court *actually did* pass upon every point raised by his appeal. In that case the Court also tells us inferentially, that an objection that the indictment “fails to describe the various acts intended to be proved with that reasonable certainty which the law requires to constitute a valid indictment may be taken for the first time on appeal. The language of that case is as follows:

“Here is not the place to object to the indictment because of the number of charges it contains. The accused, without objection open to them on this score is that the indictment fails to describe the various acts intended to be proved with that reasonable certainty which the law requires to constitute a valid indictment.”

The attempted answer to our contention that the accusation is either against a corporation or an insane man is a mere begging of the question. On this we refer again to our opening brief.

There are several attempts to answer other portions of our argument. The changing of the wording and punctuation of the indictment, for instance, on page eight, line three of reply brief: It is stated that Dr. Oesting was to furnish treatment “without any *real* knowledge of the condition of the person,” whereas the indictment uses the words

“without any proper knowledge of the real condition”.

Also, about the middle of the same page, it is stated that Dr. Oesting was to have “no real or proper knowledge of such person’s condition”, whereas, the allegation, as a matter of fact is “That Dr. Oesting was to have ‘no proper or professional knowledge of such person’s condition’ ”. Even were the indictment in the language claimed in the brief it would still be defective, but these mis-statements show recognition on the part of the government’s attorney of the fact that it cannot be denied that one who is a licensed physician has proper and professional knowledge.

Again on the same page, lines eleven and twelve, there is an attempt to change the meaning of the indictment by omitting a comma. It is there alleged that the medicine and treatment were not to be “skillfully and properly designed and prepared for the cure of the disease”; whereas, the language of the indictment is “that Dr. Oesting would send or deliver to each of said persons so sending or delivering to him sums of money, certain medicine or treatment not skillfully or properly designed, prepared, and of little or no value for the cure of the aforesaid persons”. There is a considerable difference between sending medicine not properly designed for the cure of the disease, and sending for the cure of the disease, certain medicine not properly designed.

N. B. There is nothing said in any brief so far filed as to the distinction between medicine of "little" value and medicine of "no" value.

On page 9, line 3, note the same mis-statement of the use of *real* knowledge instead of proper and professional knowledge.

On lines 8 and 9 of page 9, the commas are again left out before and after the words "for the cure"

On line 20, page 9, it is stated that treatments by reputable physicians contemplate at least "good faith". We can find nothing in the indictment which seems to deny good faith. There is nothing in the indictment which shows that Oesting was to state that any person was afflicted with a disease, whereas, as far as he knew, or had reason to believe, the person was of sound health.

Durland v. United States, 161 U. S. 306.

"* * * Contention * * * is that the statute reaches only such cases, as, at common law, would come within the definition of 'false pretenses', in order to make out which there must be a misrepresentation as to some existing fact and not a mere promise as to the future. * * * And then, as counsel say * * * 'it (the indictment) discloses on its face absolutely nothing but an intention to commit a breach of a contract. If there be one principle of criminal law that is absolutely settled * * * it is that fraud either in the civil courts or in the criminal courts must be the misrepresentation of an existing or past fact, and cannot consist of the mere intention not to carry out a contract in the future'

“It (the statute) includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose. * * * And it would strip it of its value to confine it to such cases as disclose an actual misrepresentation as to same existing fact, and exclude those in which is only the allurements of a promise.

“The question presented by this indictment to the jury was not as counsel insist, whether the business suggested in this bond was practicable or not. If * * * this * * * defendant * * * had entered in good faith upon that business * * * no conviction could be sustained, no matter how visionary might seem the scheme.”

There is no contention on our part that the crime of mis-using the mail cannot be established by proof of a fraudulent scheme to do something in the future. Our claim is that “this class of case is akin to the prosecutions in State Courts for obtaining money by false pretense in which cases it has been held, in accordance with common sense, that it is not sufficient to allege fraud, but the scheme must appear to be fraudulent and of such a nature as to be calculated to cause one to part with his money”, i. e., we cite the decision of State Courts on the point that it is necessary, as stated in the Government’s brief, “to show its design and adaptability to deceive”. It is not sufficient to say this scheme is fraudulent, the scheme must be of such a nature as to be designed to defraud and to be adaptable to fraudulent purposes. Where, as a

matter of fact, the statement of the alleged scheme shows that the scheme is honest and not intended to deceive, the allegation as to fraud of defendant is controverted in the indictment itself. We will say more on this point later.

Brooks v. United States, 146 Fed. 223.

The section read in the light of Durland v. U. S. and other cases contemplates any scheme of certain character "provided only it was designed and reasonably adapted to defraud."

"The most successful schemes to defraud are those dressed in the garb of honesty and hedged about with all the appearance of legal and enforceable undertakings. If the intent and purpose is to deceive and defraud the unwary it matters not what form the project is made to take."

and

"* * * the particulars of the scheme are matters of substance, and must be set out with sufficient certainty to show its existence and character, and to fairly acquaint the accused with what he is required to meet."

Citing:

United States v. Hess, 124 U. S. 483;

Stokes v. U. S., 157 U. S. 187;

Stewart v. United States, 119 Fed. 89;

Miller v United States, 133 Fed 337.

United States v. Loring, as cited in the Government's brief agrees with us.

In answer to the Government's statement that we do not seem to be able to find any case to sustain

our assertion that this indictment does not set forth a scheme to defraud, we might ask: Where are the Government's cases showing that the indictment does set forth a scheme? But we will not say this, because we believe that no such ridiculous attempt at an indictment has ever before been framed, and if it has been, we have too much respect for the ability of our Federal Courts to think that it could ever have passed as far as an appellate Court were any objection made below. We might further state that there are no two cases just alike and that we are looking for the statements of principle, not of facts.

The contention that the term "Dr" in the indictment before this Court, can mean anything or could have referred to anything but to a doctor of medicine, is too puerile for comment, even if it were not further alleged that Dr. Oesting represented that he was a physician, duly qualified and licensed to practice in the State of California, which allegation is nowhere claimed to have been untrue. It certainly cannot be claimed that the indictment alleges that he is not a doctor or physician.

On line five page twelve, we have more mis-statements as to the facts of the indictment. Nowhere in the indictment does it say that the defendant would furnish treatment "not knowing the real physical condition of the said patient". The allegations all through the indictment are that he did not have "proper or professional" knowledge. There is nothing said at all regarding physical condition.

We agree with the Government that it cannot be honestly contended that the allegation does not tend to negative the honesty of the pretenses.

MacKenzie v. Gordon, cited by the Government, is not in the least like the present case.

What the indictment in that case set forth we do not know, as no complaint is made to the indictment on the appeal; but we strongly suspect that, if the Oesting indictment was modelled upon it, either the model was considerably chipped during the journey to San Francisco or the Oesting facsimile was dropped and broken and some of the pieces lost; for the Court instructed the jury that the Government in the MacKenzie case was “charging” that defendant’s assertions “* * * *were untrue*; that they were *known to be untrue* by the defendant; that he used the United States mails in further execution of this fraud * * *”, and was also charging that the letters sent to defendant “showed no condition of disease; that the defendant knew that they showed no condition of disease * * * he led the persons * * * to believe that they were suffering with serious disease which he could cure; *that this was false; that he knew it to be false.*”

“In another part of the charge he stated that the government was asserting that the defendant ‘professed to cure certain diseases that he could not cure, and *which he knew he could not cure*’, adding that if defendant’s advertisement was false, ‘and *known to be false* by the defendant, and he was attempting to gain money

from persons upon this advertisement, and using the mails in execution of it, then a scheme to defraud exists.' ”

Miller v. U. S., 133 Fed. 337: We do not have to go outside of the Government's brief to find out how far this case is from sustaining the indictment against Dr. Oesting. The scheme was in its very essence fraudulent. The Court says:

“They could not have committed the acts which they agreed to devise and to do without despoiling them.”

Lemon v. U. S., 164 Fed. 953: Here also the scheme is “well designed and adapted to deceive” and is described with “sufficient certainty to show its existence and *character*.”

U. S. v. White, 150 Fed. 379: This is merely the report of a case in the *District* Court. Nor does it hold what the Government's attorney wants us to think it does. The indictment charges that the defendant's scheme was to advertise that he would, for cash, teach occult powers and furnish charms and the means for making charms which the prisoner intended to falsely pretend would have magical powers. That the pretence was false and fraudulent and that defendant knew “he could not and would not” (page 383) do the things represented. And so on, setting out the entire scheme. The instruction then, that is referred to is that the jury is concerned as to whether or not defendant “would” do as promised, not as to whether he “could”.

There is no question raised as to the sufficiency of the indictment, nor as to the requisites of the scheme.

U. S. v. Young, 215 Fed. 267: Some of the defects of the Oesting indictment have been here foreseen, for the scheme set out is one to send remedies to persons who are not sick and not in need of those or any other remedies. The fraud is fully set out.

Rumble v. U. S., 143 Fed. 722: This case is covered by the comments on the other cases in the Government's brief.

Charles v. U. S., 213 Fed. 707: There must be *false* representations, and a reading of the case will show the necessity of the further element of knowledge.

Harrison v. U. S., 200 Fed. 662: We reserve a consideration of this case for the present, as we intend to use it further on.

At this time we must apologize for our frequent statements that a scheme to defraud must be a fraudulent scheme, for we have waked to the realization that the fraud must rather be "in the scheme"; that is, there must be a scheme within a scheme, a main scheme with an "underlying scheme". (The quotations are from Harrison v. U. S., *supra*.) To sell green cheese is a scheme to defraud if there is an underlying scheme to make use of the green cheese business to obtain cheese

for nothing by writing to farmers that we intend to pay for it, whereas we do not intend to give the farmers anything.

Nevertheless, we do not think that our time has been wasted, if the Court will consider that where we have said that no fraudulent scheme is shown, we mean that no fraud has been shown in the scheme, and that no fraudulent scheme has been shown as underlying the main scheme.

Just exactly what is necessary is set out in the above case of *Harrison v. U. S.*, as follows:

“ * * * the statutory ‘scheme to defraud’ may be found in any plan to get the money or property of others by deceiving them as to the substantial identity of the thing which they are to receive in exchange; and this deception may, of course, be by implication as well as by express words. On the other hand ‘the scheme’ cannot be found in any mere expression of honest opinion as to the quality or as to future performance. There must be the underlying intent to defraud * * * It is true that the *Durland* case contemplates as within the statute ‘suggestions and opinions as to the future’: but necessary limitations on a too broad construction of this language are indicated in the *MacAnnulty* case, 187 U. S. 94 * * * ” (page 665).

“The ‘schemes’ which have been punished have all smacked of the confidence game, of getting something for nothing, like selling worthless corporate stock * * * running a bucket shop under the pretence of doing real trading * * * running a fake marriage bureau * * * getting consignments without intent to remit * * * financial schemes impossible of performance * * * and the like. Schemes like those discussed in *Harris v. Rosenberger*

* * * and in the cases it reviews, fall in this same class, because, though the representation affects quality or performance, it directly pertains to a fact or a plan inherent in the substantial identity—the essential characteristics—of the thing itself, and even though the original and underlying business is legitimate, the use being made of it is fraudulent” (page 666).

“We do not fail to observe that in a prosecution of this character fraud need only be in the underlying scheme, and it is not necessary that the matter sent through the mail should itself contain fraudulent statements; but in this case the fraud in the scheme is predicated solely on the alleged false and misleading statements contained in the circulars, and hence they must be examined” (page 667).

And referring to the particular case being discussed:

“ * * * we find no sufficient basis for a charge of fraud in the advertising, nor any room for an uncertainty of intent therein which may be solved one way or the other; and as a *fraudulent scheme* in that respect is the basis of the indictment, the charge must fail, and there being no primary scheme, the accessory or supplemental scheme is not important.”

(So as not to seem to be attempting to mislead, we must state that the supplemental scheme referred to in this last paragraph has no reference to the “underlying” scheme referred to before.)

The foregoing case was decided in 1912.

The indictment against Dr. Oesting does not show the fraud “in the scheme”, the underlying fraudulent scheme. It alleges that the doctor conceived a

fraudulent scheme to eat cream cake and the mailing of a letter in execution of the scheme, but the very scheme negatives the fraud, unless he further alleges that the eating of the cream cake, and the mailing of letters to get cream cake were done to get free cake at the expense of the bakers who expected to get paid.

The indictment is nothing more than a charge that plaintiff in error has entered upon the unethical practice of his profession of medicine. If the accusation made against this plaintiff in error amounts to a crime, then every man engaged in the practice of the profession of medicine stands equally indicted, if not before the law, before the world.

An analysis of the salient points of the indictment (the facts constituting the offense, as distinguished from the general accusation of fraud) discloses that the plaintiff in error is charged with violating a Federal Statute because, forsooth, he has:

- (a) Practiced his profession under a name other than his own (called himself Dr. Jordan);
- (b) Unethically advertised his special qualification and ability to treat certain diseases;
- (c) Sought interviews with his patients through the mails as well as by personal consultations.
- (d) Made careless unskillful, improper or incorrect diagnosis of the ailments of his patients;

(e) Forwarded to his patients medicines “for the cure” of their ailments, not skillfully prepared, or not skillfully designed, or not “properly” prepared, or of little or no value for the cure of his patients;

(f) Accepted money for such service and such medicines.

The entire charge is equivalent to saying that he has violated the ethics of his profession and never should have been licensed to practice. It is an allegation of unprofessional conduct but not the statement of a crime. It is not a fraud to be negligent, careless or indifferent with your clients or your patients, while accepting fees for services rendered them.

It is rather an arraignment of one’s unfitness to longer practice his profession; but not an accusation the truth of which is sufficient to land him in jail.

It is nowhere charged that:

1. Dr. Oesting was not a licensed graduate physician, or that:

2. Dr. Oesting was not generally qualified to practice the profession of medicine; or that:

3. Dr. Jordan was known either by reputation or service to any of the persons sought to be defrauded; or that

4. Any of said persons had ever previously been treated by Dr. Jordan; or

5. Believed that they were to be, or were being treated by Dr. Jordan; or that

6. None of said persons would have paid money to, or consented to be treated by Dr. Oesting instead if Dr. Jordan did not exist.

The fantasy of the accusation lies in the supposition that the public were to be fooled by the mere magic of a name: that Jordan was a more euphonious cognomen than Oesting and that, therefore, more people might be induced to put themselves under the treatment of Oesting, if he changed his name to Jordan. So far as the law's requirements are concerned, there are no degrees of qualification in any of the learned professions, one who is qualified to practice his profession is as much so qualified as another, however eminent he may have become; and so in this case, had Dr. Oesting been the most eminent and skillful member of the medical profession, giving to his patients the highest class of service and experience, he would be chargeable with fraud because he told his patients his name was Jordan. Fie, upon such a charge!

The Courts have time and again asserted that "medicine is far from being an exact science. Its diagnosis is but a guess enlightened sometimes by experience". Therefore incorrect diagnosis, even though made by a physician practicing under an assumed name, cannot alone constitute fraud, unless the patients knew of and believed in the skill of the

physician under whose name the service is being given, and were induced thereby to employ him.

No such claim is made in this prosecution; because it is admitted by the Government that no such person as Dr. Jordan existed. The elements of fraud are all lacking, because there can be no natural connection between the alleged scheme or artifice to defraud, existing solely in the mind of the accused, and the parting by any person, with money for medical services actually performed or medicines actually delivered, however impotent to perform a perfect cure. That the services were of *some* value and the medicine of *some* merit is admitted by the allegations of the indictment which merely charges that Dr. Oesting was “without any *proper* knowledge of the real condition” of the patients; and that the medicines were “of *little* value” for the cure. It was just as easy to have charged *no* knowledge on the part of the doctor and *no* value in the drug.

Had the Government intended to make such an accusation the indictment would have been drawn to meet it.

American School of Magnetic Healing v. McAnulty, 187 U. S. 94: The bill alleged that plaintiffs were a business corporation and its manager, and the defendant the postmaster in City of Nevada; that plaintiffs conducted a business of treating people afflicted with ills and with teaching the healing methods to others; that a large amount of such business consists of treatment by letter:

“And your orators state that said business is a legal and legitimate business * * * and is founded largely and almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting and remedying thereof.

“And that the human race does possess the innate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to, and plaintiffs discard and eliminate from their treatment what is commonly known as divine healing and Christian Science, and plaintiffs are confined to practical scientific treatment emanating from the source aforesaid.”

That the postoffice made an order to the effect that the plaintiffs

“ * * * are engaged in conducting a scheme or device for obtaining money by means of false and fraudulent pretenses, representations and promises, in violation of the act of Congress * * * ”,

and further forbidding the payment of postal orders and instructing the return to the senders of letters addressed to plaintiffs, the word “fraudulent”, being first stamped on the letters.

It is Held:

“These allegations (as to plaintiffs’ business) are statements of fact upon which, as averred, the business of the complainants is based, and the question is whether the complainants who are conducting the business upon the basis stated thereby obtain money and property through the mails by means of false or fraudulent pretenses, representations or promises.

Can such a business be properly pronounced a fraud within the statutes of the United States?" (page 103)

"There can be no doubt that the influence of the mind upon the physical condition of the body is very powerful, and that a hopeful mental state goes far in many cases, not only to alleviate, but even to aid very largely in the cure of an illness from which the body may suffer. And it is said that nature may itself, frequently, if not generally, heal the ills of the body without recourse to medicine, and that it cannot be doubted that in numerous cases nature when left to itself does succeed in curing many bodily ills. How far these claims may be borne out by actual experience may be matter of opinion. Just exactly to what extent the mental condition affects the body, no one can accurately and definitely say * * * *but surely it cannot be said that it is a fraud for one person to contend that the mind has an effect upon the body and its physical condition greater than even a vast majority of intelligent people might be willing to admit or believe.* Even intelligent people may and indeed do differ among themselves as to the extent of this mental effect. Because the complainants might or did claim to be able to effect cures by reason of working upon and affecting the mental powers * * * who can say that it is a fraud or a false pretense or promise within the meaning of these statutes? How can anyone lay down the limit and say beyond that there are fraud and false pretenses? The claim of the ability to cure may be vastly greater than most men would be ready to admit, and yet those who might deny the existence or virtue of the remedy would only differ in opinion from those who assert it. There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the

subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud or false pretence of promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by a resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity. We may not believe in the efficacy of the treatment to the extent claimed by the complainants, and we may have no sympathy with them in such claims, and yet their effectiveness is but a matter of opinion in any court. * * *

“Suppose a person should assert that by the use of electricity alone, he could treat diseases as efficaciously and successfully as the same have heretofore been treated by ‘regular’ physicians. Would these statutes justify the postmaster general, upon evidence satisfactory to him, to adjudge such claim to be without foundation and then to pronounce the person so claiming, to be guilty of procuring, by false or fraudulent pretenses, the moneys of people sending him money through the mails, and then to prohibit the delivery of any letters to him? The moderate application of electricity, it is strongly maintained, has great effect upon the human system, and just how far it may cure or mitigate diseases no one can tell with certainty. It is still in an empirical stage, and enthusiastic believers in it may regard it as entitled to a very high position in therapeutics, while many others may think it absolutely without value or potency in the cure of disease. Was this kind of question intended to be submitted for decision to a postmaster general, and was it intended that he might decide the

claim to be a fraud and enjoin the delivery of letters through the mail addressed to the person practising such treatment of disease? As the effectiveness of almost any particular method of treatment of diseases is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the postmaster general within these statutes relative to fraud. Unless the question may be reduced to one of fact as distinguished from mere opinion, we think these statutes cannot be invoked for the purpose of stopping the delivery of mail matter.

“Vaccination is believed by many to be a preventive of smallpox, while others regard it as unavailing for that purpose. Under these statutes could the postmaster general, upon evidence satisfactory to him, decide that it was not a preventative, and exclude from the mails all letters to one who practiced it and advertised it as a method of prevention, on the ground that the moneys he received through the mails were procured by false pretenses?

“Again, there are many persons who do not believe in the homeopathic school of medicine, and who think that such doctrine, if practised precisely upon the lines set forth by its originator is absolutely inefficacious in the treatment of diseases. Are homeopathic physicians subject to be proceeded against under these statutes and liable at the discretion of the postmaster general, upon evidence satisfactory to him, to be found guilty of obtaining money under false pretenses and their letters stamped as fraudulent and the money contained therein as payment for their professional services sent back to the writers of the letters?

And, turning the question around, can physicians of what is called the 'old school' be thus proceeded against? Both of these different schools of medicine have their followers, and many who believe in the one will pronounce the other wholly devoid of merit. But there is no precise standard by which to measure the claims of either, for people do recover who are treated according to the one or the other school. And so, it is said, do people recover who are treated under this mental theory? By reason of it? That cannot be averred as matter of fact. Many think they do. Others are of the contrary opinion. Is the postmaster general to decide the question under these statutes?

"Other instances might be adduced to illustrate the proposition that these statutes were not intended to cover any case of what the postmaster general might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis.

"It may perhaps be urged that the instances above cited by way of illustration do not fairly represent the case now before us but the difference is one of degree only. It is a question of opinion in all the cases, and although we may think the opinion may be better founded and based upon a more intelligent and a longer experience in some cases than in others, yet after all it is in each case opinion only, and not existing facts with which these cases deal. There are, as the bill herein shows many believers in the truth of the claims set forth by complainants, and it is not possible to determine as a fact that those claims are so far unfounded as to justify a determination that those who maintain them and practice upon that basis obtain their money by false pretenses

within the meaning of these statutes. The opinions entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved as matter of fact that those who maintain them obtain their money by false pretenses or promises, as that phrase is generally understood and, as in our opinion, it is used in these statutes.

“That the complainants had a hearing before the Postmaster General, and that his decision was made after such hearing, cannot affect the case. The allegation in the bill as to the nature of the claim of complainants and upon what it is founded, is admitted by the demurrer, and we therefore have undisputed and admitted facts, which show upon what basis the treatment by complainants rests, and what is the nature and character of their business. From these admitted facts it is obvious that complainants in conducting their business, so far as this record shows, do not violate the laws of Congress. The statutes do not as matter of law cover the facts herein.”

Harrison v. U. S., *supra*, shows the same rule to apply to a criminal prosecution for using the mails to defraud.

We have omitted any mention of the rule of law that prevents the building up of a crime by the aid of inference, implication and strained interpretation, but the remarks made as to fraud in connection with the accusations against Dr. Oesting, and the further remarks made in the foregoing pages regarding the attempt to make a mere unethical

practice of medicine seem a crime, call to mind the case *Ex parte McNulty*, 77 Cal. 164.

That was a petition for a writ of habeas corpus by a doctor who had been imprisoned for continuing to practice medicine after his license had been revoked for "unprofessional conduct" in advertising himself as a specialist in certain enumerated diseases. Held that the conduct of petitioner did not constitute a criminal offense:

" * * * the only penal clause * * * in the act * * * is as follows: 'Any person practicing medicine or surgery in this state, without having first procured a certificate so to do from one of the board of examiners * * * shall be guilty of a misdemeanor. * * * Practicing after an order of the board revoking the certificate for 'unprofessional conduct' is not declared to be a crime, and no penalty is attached to it. Respondent's position really is, that the legislature must have intended such conduct to be a criminal offense. * * * It would certainly be a forced thing to imagine their intent to be that a man should lose his liberty for the violation of any vague, undefined notion of unprofessional conduct, which might, after the fact, be entertained by certain individuals constituting a board of examiners. * * * There is nothing there (in the act) that declares such conduct to be a criminal offense. * * * *Constructive crimes—crimes built up by the Courts with the aid of inference, implication and strained interpretation—are repugnant to the spirit and letter of English and American law.*'"

Whether or not certain facts constitute fraud is a question of law, and although fraud is charged,

if the facts supposed to constitute fraud are fully set out and according to law they do not constitute fraud, then the allegation of fraud is negatived. The facts set out in the Oesting indictment negative fraud, unless we adopt "inference, implication and strained interpretation", which is repugnant to the letter and spirit of American law.

Dated, San Francisco,

April 6, 1916.

Respectfully submitted,

HERBERT CHOYNSKI,

JAMES RALEIGH KELLY,

Attorneys for Plaintiff in Error.

No. 2712.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL OESTING, alias Paul Allen,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

**PETITION OF PLAINTIFF IN ERROR FOR
A REHEARING**

HERBERT CHOYNSKI,

JAMES RALEIGH KELLY,

Attorneys for Plaintiff in Error.

JAMES RALEIGH KELLY,

*Of Counsel for Plaintiff in Error
and Petitioner.*

Filed this.....day of August, 1916.

Filed FRANK D. MONCKTON, Clerk.

By **AUG 23 1916** Deputy Clerk.

F. D. Monckton,

Clerk

No. 2712.

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*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals, for the Ninth
Circuit:*

The plaintiff in error respectfully asks the Court to grant a rehearing of this cause upon the grounds hereinafter stated.

THE JUDGMENT OF DISTRICT COURT SHOULD
HAVE BEEN REVERSED.

The judgment of the District Court should have been reversed for the reasons:—

1. That the indictment is lacking in one or more essential elements to constitute the offense attempted to be charged.

2. That, more particularly, the indictment does not set forth "a scheme reasonably calculated to deceive persons of ordinary comprehension and prudence."

3. The indictment does not set forth the particulars of the alleged scheme to defraud sufficiently to advise the defendant that he is charged with the commission of a crime.

4. The alleged "scheme to defraud" as set forth in the indictment in itself negatives the allegation that it is intended to defraud.

THE LAW.

The law applicable to this case, as found by this Court on the appeal is as follows:—

1. " . . . The section does not require that the scheme be fraudulent on its face. . . . All that is required is that it be a scheme reasonably calculated to deceive persons of ordinary comprehension and prudence and that the mail service of the United States be used and intended to be used in execution of the same."

2. " . . . by the defendant's failure to demur to an indictment or enter a motion to quash, or a motion in arrest of judgment after verdict, he waives his right to object in an appellate

court to any matter which goes to the form in which the offense is stated, but he does not waive the right to raise the objection that the indictment is lacking in some essential element to constitute the offense which is charged."

THE FACTS.

We disagree somewhat with the statement of facts accompanying the opinion of the Circuit Court and believe that it is our failure to properly emphasize that there is an erroneous statement of them in the brief for the people that has led to this misunderstanding.

The facts are, briefly, that a certain doctor named Oesting intended to correspond, under an assumed name, with various persons, making use of the United States Post Office. He was to state to them that he was a doctor skilled in the treatment of private diseases of men and to induce them, by letters and advertisements, to communicate with him relative to their real or supposed ailments, and then, having no *proper* knowledge of their real condition, tell them they were afflicted with diseases which he could cure, and induce them to send money for medicines and treatments for diseases which they had been so* induced by defendant to believe themselves afflicted with, and send medicine and treatment not properly designed and having no value,* for their cure,* he having no *proper or professional* knowledge of such person's condition

or whether they were diseased or whether such medicine and treatment would benefit them. (The asterisks mark important portions omitted in the statement accompanying the opinion.)

There are various statements in the indictment to the effect that the name assumed by Dr. Oesting was not the name of a doctor or of any real person, and that Dr. Oesting knew this; but these have no bearing on the matter, for it is not a crime to call yourself Smith instead of Brown, as long as there is no Brown, or as long as you are not trading on the name of Brown, who is or has been a man of repute while you are no-one in particular.

The Court has been led into error by a statement that Oesting sent medicines and treatment having little or no value for the cure of afflicted persons, whereas the indictment sets out that the medicines and treatment were *sent* for the cure of such persons; whatever their value, they were intended to cure, it was the wish, the desire, of defendant that they should cure.

The Court has further been led into error by a statement that the defendant was to be sent money for the treatment of diseases which persons "had been induced by the defendant to believe themselves afflicted with." But there is nothing of that sort in the indictment. The indictment says that persons were to be induced to send money for medicines and treatment "for the cure or alleviation of the diseases

with which said persons were afflicted, or had been so induced to believe themselves afflicted." "So induced" must refer to something that was intended to be made a part of the indictment but was left out, for there is no place in the indictment where it is stated that Dr. Oesting induced anyone to believe himself ill; or, if we stretch the word "so" to such an extent as to apply it to everything that precedes it in the indictment, we must, nevertheless, confine ourselves to the facts. Suppose then, these persons were induced to think themselves ill by the doctor's statement that he was skillful and by his diagnoses made without proper knowledge of the person's condition, there is no criminality. He has boosted his wares, called himself an extraordinary doctor, when he was only an ordinary one, claimed a special knowledge, when he knew his knowledge was no greater than that of any other doctor. But boosting your wares is not recognized as a crime. If it were most of us would be in jail.

CERTAIN PRINCIPLES.

In examining the indictment there are certain principles to be recognized, certain inalienable rights of all defendants in criminal cases. These must be used in applying the law to the facts.

The reverence of the American people for Liberty, that greatest of all things in life, is nowhere more

evident than in their care for the rights of those accused of crime. Three times in the Constitution of the United States have they shown their desire to protect the innocent, even though this protection may often result in the escape of those who are guilty.

The Fifth Amendment provides that one can be prosecuted only on presentment or indictment; that he cannot be twice put in jeopardy for the same offense; that he need not be a witness against himself; that he cannot be deprived of liberty without due process of law.

The Sixth Amendment gives him the right of trial by an impartial jury; to be informed of the nature of the accusation against him; to be confronted by the witnesses and to have witnesses in his own behalf.

The Fourteenth Amendment is a repetition of the others, imposing upon the States the obligation of observing carefully the rights of the accused, wherever life or liberty is at stake.

Recognizing this reverence for liberty; this desire to protect the innocent at all costs, even to the advantage of the guilty, the Supreme Court has held that it is not enough that there should be a presentment or indictment, but these must clearly set forth both the crime and the circumstances and exact specifications as to what it consists of, to the end that neither the criminal nor the court which tries

him may be mislead, and that there may be no doubt in case of a second accusation of the same offense.

“ . . . every ingredient of which the offense is composed must be accurately and clearly alleged . . . ”

U. S. vs. Cook, 17 Wall. 174.

U. S. vs. Cruikshank, 92 U. S. 542.

“In criminal cases prosecuted under the laws of the United States, the accused has the right “to be informed of the nature and cause of the accusation.” Amend. VI. In *United States vs. Mills*. 7 Pet. 142, this is construed to mean, that the indictment must set forth the offense “with clearness and all the necessary certainty to apprise the accused of the crime with which he stands charged.’ ”

“For this facts are to be stated, not conclusions of law alone. A crime is made up of fact and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.”

U. S. vs. Cruikshank, supra.

And in the case of the particular crime with which it is attempted to charge the defendant in this case, particular specification has been required; it is not enough to charge that a scheme has been devised and that it is intended to defraud. The scheme, as stated by this Court, must be one such as can be expected to succeed; to actually defraud; to defraud to the injury of the person defrauded and to the advantage of schemer; it must be “reasonably calculated” to defraud. And this scheme must be so clearly and specifically set out that there can be no

mistake, it must appear in the indictment with full specification.

“The statute is directed against ‘devising, or intending to devise, any scheme or artifice to defraud,’ to be effected by communication through the postoffice. As a foundation for the charge, a scheme or artifice to defraud must be stated, which the accused either devised or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, *and to acquaint him with what he must meet on the trial.*”

“Such particulars are matters of *substance* and not of form, and their omission is not aided or cured by verdict.”

U. S. vs. Hess, 124 U. S. 483.

(The italics are ours.)

CONCLUSION.

Taking the foregoing principles and carefully observing them while applying the law as heretofore stated by this Court on this appeal to the facts set forth in the indictment, can it be held that the District Court was correct in finding that that indictment set out a crime, and set it out with the specification required by the Supreme Court in passing upon the meaning of the Constitution?

A person's good name is an important matter, his liberty means as much as his life; the American People have said this, they have insisted upon it in three distinct amendments to their Constitution.

Trial by jury is an inalienable right. It is a very serious matter to mislead a man by an imperfect indictment and cause him to waive this right. Is he to come in and confess that he has been unethical in his practice as a doctor, that he has claimed to be better than he is, that he has sent medicines not so good as he claimed them to be nor as good as some other specialist might prepare, and be told that he is therefore to be deprived of liberty? Is he to be accused of these things and then be sent to jail for confessing them?

Dr. Oesting schemed to convince people that he was extraordinarily competent, whereas he was but ordinarily so; he schemed to diagnose in accordance with his ability, his knowledge was not "proper or professional," but it was knowledge; he must have had some knowledge, for he was a doctor, and the very use of the term denotes at least some knowledge of medicine; but he did not have a proper amount of knowledge nor the amount he claimed to have. He knew that his medicines were not "*properly* designed or prepared," but he thought they had at least some value for the cure of the persons to whom they were sent, value in proportion to his knowledge, for he sent them to cure, he expected them to cure, slowly perhaps, but finally; they were sent "for the cure" of the persons afflicted.

Sometimes the symptoms communicated to him might indicate health, but he was not to be guided

by these symptoms alone; nowhere in the indictment does it appear that he was to be guided by these alone, and the letters attached do show as a matter of fact that he tried other means to ascertain the condition of his correspondents; he actually made use of urinary analysis, chemical test papers, other data and records, and personal interviews; it does not appear whether or not actual physical examinations were made at his office in San Francisco, but he requested personal interviews, and we assume the physical examinations were made. At any rate he did not confine himself to the symptoms communicated by letter; it might happen that persons were ill, though their own statements of their symptoms indicated health, but the very fact that they should consult a doctor would seem an indication that something was wrong, though not properly expressed in letters. In such case he sought further particulars, physical examination, advice of the family physician, samples of blood and urine, or whatever might seem to him proper. He did not guide himself entirely by the fact that the letters sent through the mail advised him only of symptoms indicating health, he went after the man, and if he was sick, in spite of the mail communications, he sent medicine and treatment for his cure.

To these things Dr. Oesting has confessed; he has not confessed to the commission of a crime.

Dr. Oesting should be allowed to go free; the Con-

stitution demands it, the decisions of the Supreme Court order it.

If the indictment here is to be turned and twisted, words omitted, commas left out or added, then, all this should be done in such a way as to benefit rather than injure the defendant. He could adopt no strained interpretation when he entered his plea of guilty; he could not foresee that words would be given other than the ordinary meaning attached to them by a layman; he read a statement of facts not criminal; he confessed to committing them; the acts may have been wrong, but he knew they were not criminal.

The people's brief on this appeal has turned and twisted acts that at most are wrong and unethical in such a manner as to make it appear to this Court that a crime has been committed. Possibly we may have shaped them in our briefs to suit ourselves. But we are representing a man fighting for liberty; fighting for what means to him perhaps more than life. We have tried to be honest, but may have been influenced more or less by the picture of a good man struggling for his freedom, as the District Attorney has been influenced by a desire to fulfill what he considers the duties of his office. But we ask now that this Court take up the transcript, consider the indictment from its four corners, remembering that this case is one that involves liberty and freedom,

not money or property; and we feel assured that the judgment of the District Court will be reversed.

Respectfully submitted,

HERBERT CHOYNSKI,
JAMES RALEIGH KELLY,
Attorneys for Plaintiff in Error.

CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the attorneys for the plaintiff in error and petitioner in the above entitled matter and that in my judgment the foregoing petition for a rehearing is well founded in point of law and is not interposed for delay.

JAMES RALEIGH KELLY,
*Of Counsel for Defendant in Error and
Petitioner.*

